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In the Supreme Court of the United States

OCTOBER TERM, 1934

NOS. 471 AND 472

UNITED STATES OF AMERICA, RECONSTRUCTION Finance Corporation, et al., petitioners

v.

BANKERS TRUST COMPANY AND WILLIAM H. BIXBY, trustees

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE RECONSTRUCTION FINANCE CORPORATION

OPINION BELOW

The opinion of the District Court (R. 109) is reported in 7 F. Supp. 1.

JURISDICTION

The decree of the District Court was entered July 6, 1934. (R. 131.) Separate appeals were allowed by the District Court on July 28, 1934, and by the Circuit Court of Appeals on July 30, 1934.

(R. 137, 254.) On October 17, 1934, prior to hearing or submission of these appeals in the Circuit Court of Appeals, a petition for a writ of certiorari was filed in this Court, and was granted on November 5, 1934. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 8 (b) of that Act.

QUESTION PRESENTED

Whether the Joint Resolution of Congress of June 5, 1933, is valid; and whether, in consequence thereof and of the Executive Orders and Regulations relating to the holding and transfer of gold and foreign exchange transactions therein, and the Gold Reserve Act of 1934 (all set out in a separate Appendix), mortgage bonds issued in 1903, maturing May 1, 1933, and containing a so-called gold clause, are dischargeable as to principal and interest at their face amount, dollar for dollar, in any lawful money of the United States, where the debtor and its properties are being administered in reorganization proceedings brought on March 31, 1933, under Section 77 of the Bankruptcy Act, as amended, c. 204, 47 Stat. 1467, 1474.

Similar, but not identical, questions are presented in the cases of *Nortz* v. *United States*, No. 531, and *Perry* v. *United States*, No. 532, in which separate briefs will be filed, but all of them involve essentially the sovereign power of the United States to deal with or the authority of the Congress to

legislate in respect of coinage and currency, to declare what shall be legal tender for all debts and to annul any contractual provision which either rejects such legal tender or accepts it at a measured discount.

STATUTES AND ORDERS INVOLVED

The pertinent statutes and orders involved are set forth in a separate Appendix.

STATEMENT

On March 31, 1933, the Missouri Pacific Railroad Company filed a petition in bankruptcy under Section 77 of the Bankruptcy Act, as amended (R. 3). The petition was allowed by the District Court on the same day (R. 5). Both the petitioners and the respondents became parties to this cause by petitions for leave to intervene, duly allowed, in the District Court (R. 52, 60, 70, 71). The respondents are trustees under the St. Louis Iron Mountain and Southern Railway Company River and Gulf Divisions first mortgage, dated May 1, 1903, which includes properties purchased by the Missouri Pacific, subject to the mortgage, at judicial sale in 1917 (R. 8). The Reconstruction Finance Corporation is a creditor of the railroad in the aggregate principal amount of $23,134,800, holding as collateral security for its claim bonds which are junior to those secured by the above-mentioned mortgage (R. 61). The United States is the sole stockholder of the Reconstruction Finance Corporation and is further interested by virtue of a claim

against the railroad for unpaid taxes amounting to approximately $5,000,000 (R. 82). The United States sought leave to intervene, by direction of the Attorney General, both because of its pecuniary claim and the paramount public interest (R. 67, 82).

On December 27, 1933, the respondents, as Trustees of the Iron Mountain mortgage, filed a petition in the District Court asking that the lien of the mortgage be determined to be in the sum of $34,548,000, with interest thereon, and that such sum and interest be determined to be payable in gold coin of the United States of the standard and [*sic*] weight and fineness prevailing on May 1, 1933 (R. 58). The respondents further requested in their petition that the court determine that any sums of money paid to them as trustees otherwise than in gold coin on account of any obligations payable in gold coin should be accepted by them at the "market value of such sums of money in such gold coin at the times of such payments" (R. 58–59). The mortgage, dated as of May 1, 1903, contains a covenant to pay principal and interest of the bonds issued thereunder and secured thereby "in gold coin of the United States of America of or equal to the present standard of weight and fineness" (R. 186). Both the coupon and registered bonds contain a promise to pay "One Thousand Dollars gold coin of the United States of the present standard of weight and fineness" and interest thereon "in like gold coin" (R. 157, 159, 235). On

April 9, 1934, the Reconstruction Finance Corporation filed an answer to the petition of the respondents, setting out the Emergency Banking Act of March 9, 1933, the Emergency Farm Mortgage Act of May 12, 1933, the Proclamations and Orders pursuant thereto, the Joint Resolution of June 5, 1933, and the Gold Reserve Act of January 30, 1934, and asking that the court determine without delay that the debt alleged to be owing on account of the principal of the bonds and the interest then or thereafter due, secured by the Iron Mountain mortgage, could be satisfied by payment of the face amount of such debt in lawful money of the United States (R. 73–76).

The United States of America and the trustees of the debtor filed substantially similar answers (R. 77–81, 91–96). The District Court, on May 22, 1934, denied a motion of the respondents to amend their petition without prejudice (R. 101); and, after oral argument and the filing of printed briefs, entered a decree, on July 6, 1934 (R. 131), adjudging that the respondents, as trustees, are entitled to payment of $1000 upon each bond in the principal amount of $1000, validly issued and outstanding, secured by the Iron Mountain mortgage, in such lawful money of the United States as is legal tender for the payment of debts, with interest thereon, also in such lawful money of the United States; and that any amounts payable to the respondents as trustees shall be paid in such lawful money of the United States as is legal tender for

debts and shall be accepted by them at the nominal value thereof, in discharge, dollar for dollar, of the face amount of the indebtedness, including interest, to which it may be applied (R. 133–4).

Two separate appeals were taken by the respondents from the decree of the District Court, one under Section 24(a) and the other under Section 24(b) of the Bankruptcy Act, as amended. Both were allowed (R. 137, 254); and, there was only one record on appeal.

The respondents assigned as error the holding of the District Court that the gold clause resolution of June 5, 1933, is constitutional, and the failure of the court to hold that the obligees are entitled under the bonds to gold coin of the United States of the standard of weight and fineness on May 1, 1903, or to the equivalent thereof, determined for each $1000 in gold coin by multiplying 1000 by 25.8 and dividing the same by 15–5/21 (R. 135–6, 252–3).

This Court granted certiorari on November 5, 1934 (R. 262).

SUMMARY OF ARGUMENT

I

Public Resolution No. 10 of the 73d Congress, approved June 5, 1933, declares that gold clauses are contrary to public policy and provides that obligations payable in money of the United States, whether or not such clauses are contained therein, may be discharged by payment, dollar for dollar,

in any coin or currency which at the time of payment is legal tender for public and private debts. The Resolution is constitutional and is controlling in the case at bar.

There were compelling reasons for the recognition and declaration by the Congress that gold clauses are contrary to public policy. Whatever justification may have existed for such clauses under the dual monetary system which prevailed during and following the Civil War, and which entailed the circulation of two kinds of money given and taken in exchange at differing values and receivable for different payments, the justification was ended by our departure from that system. Gold clauses are inconsistent with the present policy of the Congress to maintain at all times the equal power of every dollar in the markets and in the payment of debts, and to accord equal legal tender qualities to all forms of money in the payment of governmental and other kinds of debt.

Not only are gold clauses inconsistent with this declared policy of the Congress, but they constitute a serious obstruction to the effective exercise by the Congress of its monetary and other powers. Their effect, if enforced, is of such serious consequence as substantially to deprive the Congress of the power to regulate the value of the dollar. Gold clauses would, if enforced, interfere with recent monetary measures adopted to protect the gold reserves of the United States, to provide a more effective use of those reserves, and to regulate and pro-

tect the foreign commerce of the United States. These monetary measures were necessary, in the judgment of the Congress, to cope with the disorganized financial and economic conditions which arose out of the World War and reached their crisis in the United States in 1933. Only by declaring that gold clauses should not be enforceable was the Congress able to take the steps required to meet these conditions. The amount of existing gold clause obligations generally estimated at about $100,000,000,000, made it essential that these as well as future issues be subject to the Resolution.

The recent monetary legislation, of which the Joint Resolution is the keystone, was clearly embraced within the delegated and sovereign powers of the Congress. Substantially similar measures have frequently been taken in the past pursuant to the power to coin money and regulate the value thereof; to assure, in accordance therewith, a uniform value to the coins and currency of the United States; to borrow money on the credit of the United States; and to regulate foreign and interstate commerce and exercise a measure of control over international relations. The provisions of the Resolution do not violate any constitutional limitations placed upon the Congress. Objections under the due process clause are answered by the fact that the Resolution was an appropriate and, in the judgment of an impressive majority of the Congress, a necessary means of assuring the effective exercise by the Congress of its delegated and sovereign powers. Ex-

isting contracts will not, as this Court has frequently declared, be allowed to obstruct a legitimate policy of the Congress.

The Resolution is controlling in the case at bar. It applies to all undischarged obligations to pay money of the United States. Although the bonds in the present case bear a maturity date of May 1, 1933, they continued to exist as undischarged obligations according to their terms and are therefore subject to the provisions of the Resolution.

II

Independently of the Joint Resolution, the claim of the respondents must be limited to the face amount of the debt, in consequence of the proclamations, orders and regulations concerning the hoarding, acquisition and export of gold coin and gold. We believe that the gold clause in the case at bar constitutes a single obligation to pay in gold coin, and does not contain an alternative promise to pay some asserted equivalent to the value of that coin. The obligation to pay in gold coin would then be excused in an action on the bonds, because of supervening illegality and impossibility; and recovery could be had, on principles of partial enforcement or of quasi-contractual restitution, for only the face amount of the debt. Even if gold coin had been paid at the due date, the bondholders could not have realized upon such coin more than the face amount thereof in lawful money, nor could they have used such coin to greater advantage in

the purchase of goods or the payments of debts. If the Court should be of opinion, however, that the gold clause contains an implied promise to pay an amount equivalent in value to the goin coin stipulated, the result is the same. At no time since May 1, 1933, has the value of goin coin to a gold clause creditor been greater than its face amount in lawful money; and on May 1, 1933, when the bonds became due, gold coin was of no greater value in this country to anyone, regardless of how it was acquired or how its value was measured.

III

Broader ground is also taken, namely, that power over coinage and currency is an attribute of sovereignty, that the United States is a sovereign nation, as frequently decided by this Court, and that the legislation and orders here involved should be supported as an exercise of this sovereign or plenary power by the Congress, to which it is committed in our system of Government, without let or hindrance by private contracts.

ARGUMENT

I

Public Resolution No. 10, approved June 5, 1933, is constitutional and controlling in the case at bar

1. Introductory

At the outset of a consideration of the constitutionality of the Resolution, the issues may be delimited by recalling two principles frequently enunciated by this Court.

The first of these principles is that an Act of the legislature is presumed to be constitutional in the absence of a factual foundation of record for overthrowing it, and that the burden is upon those attacking the law to demonstrate its unconstitutionality by clear and convincing proof. This Court said, in the *Legal Tender Cases* (12 Wall. 457, 531):

> A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no trangression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule. In *Commonwealth* v. *Smith* (4 Binney 123), the language of the court was, "It must be remembered, however, that for weighty reasons, it has been assumed as a principle in construing constitutions, by the Supreme Court of the United States, by this court, and by every other court of reputation in the United States, that an act of the legislature is not to be declared void, unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt;" * * *

This principle, established in the early history of Supreme Court litigation, has received numerous applications by this Court within the past few years.

Sinking Fund Cases, 99 U. S. 700, 718; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 475; *Powell* v.

Pennsylvania, 127 U. S. 678, 685; *Buttfield* v. *Stranahan,* 192 U. S. 470, 492; *Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61, 79, 83; *Chicago Dock & Canal Co.* v. *Fraley,* 228 U. S. 680, 687; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357; *James Everard's Breweries* v. *Day,* 265 U. S. 545, 560; *Wampler* v. *Lecompte,* 282 U. S. 172; *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251; *Railway Express Agency* v. *Virginia,* 282 U. S. 440, 444; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, 158; *Boston & Maine R. R.* v. *Armburg,* 285 U. S. 234, 240; *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 283; and *Williams* v. *Baltimore,* 289 U. S. 36, 42.

Of these cases, which are merely representative and not exhaustive, the last seven were decided since 1930.

The second principle is that in choosing the means to carry out the powers granted by the Constitution, the Congress has an extremely wide discretion, and its judgment will not be overturned unless clearly arbitrary or capricious. *McCulloch v. Maryland,* 4 Wheat. 315, 418; *United States* v. *Fisher,* 2 Cranch 358; *Legal Tender Cases,* 12 Wall. 457; *Farmers' and Mechanics' National Bank* v. *Dearing,* 91 U. S. 29, 33; *Juilliard* v. *Greenman,* 110 U. S. 421; *Ex parte Curtis,* 106 U. S. 371; *Northern Securities Co.* v. *United States,* 193 U. S. 197; *Ling Su Fan* v. *United States,* 218 U. S. 302; and *Board of Trustees of University of Illinois* v. *United States,* 289 U. S. 48.

In short, those attacking the Joint Resolution must prove that there is clearly no reasonable relation between that Act and the powers granted to Congress in the Constitution, or that the Act falls within a specific prohibition of the Constitution. We shall show that, so far from being arbitrary or capricious, the discretion of the Congress in enacting the Joint Resolution was exercised in a way which has been considered by broad and informed opinion to be indispensable to the proper and effective exercise by the Congress of its monetary and other powers.[1]

The Gold Clause

The phrase "gold clause" is used in common parlance to refer to any one of a number of provisions calling for a particular kind of payment. The most common type is that used in the bonds in

[1] The question of constitutionality is not affected by the decision of the House of Lords, rendered on December 15, 1933, in *Feist* v. *Société Intercommunale Belge d'Electricité*, 1934 A. C. 161, nor by the decisions of the Permanent Court of International Justice in the cases of the Serbian and Brazilian bonds, P. C. I. J., Series A–Nos. 20–21. The decisions in those cases turned entirely upon the meaning to be given to the gold clause in the absence of any statutes intended to abrogate such clauses. Those cases will be considered in connection with the defense of impossibility, pages 120–123, *infra*, where the proper interpretation of the gold clause is important.

the case at bar, calling for payment of "One Thousand Dollars in gold coin of the United States of the present standard of weight and fineness" and interest thereon "in like gold coin."[2] A second type of gold clause, referred to more accurately as a "gold value clause", calls for payment in gold coin of a particular standard of weight and fineness or in an amount in money measured thereby. A third type, more common in the middle part of the last century, calls for payment in gold coin without attempting to define its weight and fineness. This was the "gold clause" in the case of *Bronson* v. *Rodes,* 7 Wall. 229, discussed below.[3]

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[2] The gold clause in all Federal bonds issued between September 24, 1917, and June 5, 1933, was of this type. The authorizing statute provided: "The principal and interest thereof shall be payable in United States gold coin of the present standard of value." Act of Sept. 24, 1917, c. 56, 40 Stat. 288.

[3] This was also the "gold clause" for the Federal interest-bearing obligations during the period of depreciated "greenbacks" and eventually for the "greenbacks" themselves. (12 Stat. 709; 13 Stat. 13). An Act of March 18, 1869, c. 1, 16 Stat. 1 (R. S. 3693), provided: "The faith of the United States is solemnly pledged to the payment in coin or its equivalent of all the obligations of the United States not bearing interest, known as United States notes, and of all the interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligations has expressly provided that the same may be paid in lawful money or other currency than gold and silver. But none of the interest-bearing obligations not already due shall be redeemed or paid before maturity unless at such time United States notes are convertible into coin at the option of the holder, or unless at such time bonds of the United States bearing a lower rate of interest than the bonds to be redeemed can be sold at par in coin."

In considering the constitutionality of the Joint Resolution of June 5, 1933, which declares gold clauses to be against public policy and unenforceable we shall use the phrase "gold clause", as does the Resolution, as referring to "every provision contained in or made with respect to any obligation [payable in money of the United States] which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency or in an amount in money of the United States measured thereby * * *." As so used "gold clause" denotes provisions calling for payment in equivalents to gold or gold coin as well as the single provision to pay a stated amount of gold or a stated number of gold coins, whether or not the weight and fineness is specified. We shall show that the Resolution was an appropriate measure for carrying into execution the powers of the Congress, to whatever type of gold clause the Resolution may be applied. It should be borne in mind, however, that the bonds in the case at bar call for payment in gold coin and not in an amount of currency measured by its value. The question of the meaning of the clause is discussed, *infra,* pages 114 to 123, in connection with the effect of the clause apart from the Joint Resolution. If the clause is, as we shall there contend, a single obligation to pay in gold coin, those attacking the Resolution must show that it is unconstitutional insofar as it annuls provisions calling for such payment, whether or not it would be unconsti-

tutional in annulling provisions calling for payment in currency measured by the value of gold. Those who would strike down a statute must show not only that they are affected by it, but that as *applied to them* it exceeds the power of the legislature.[4]

The importance of the gold clause is due to the overwhelming amount of obligations calling for payment in gold coin of the old standard (or an amount in other money measured thereby) issued and outstanding at the time of the passage of the Joint Resolution of June 5, 1933. The best estimates place the amount of such gold-clause obligations at approximately $100,000,000,000. This figure, which includes public obligations of an estimated amount of about $25,00,000,000, was given in Congress by almost all who discussed the Joint Resolution. Congressman Steagall, Chairman of the Committee on Banking and Currency which reported the bill, stated on the floor that the amount involved was over $100,000,000,000. 77 Cong. Rec., Part 5, page 4531.[5] Congressman Luce, who pre-

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[4] *Austin* v. *Aldermen of Boston*, 7 Wall. 694; *Supervisors* v. *Stanley*, 105 U. S. 305, 314; *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Darnell* v. *Indiana*, 226 U. S. 390, 398; *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, 54, 55; and *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-Op. Marketing Ass'n*, 276 U. S. 71, 88.

[5] Others who estimated the amount at $100,000,000,000 were Congressman Parsons (*Idem*, page 4520), Congressman Busby (*Idem*, page 4523), Congressman Greenwood (*Idem*, page 4526), Congressman Gray (*Idem*, page 4545), and Senator Borah (*Idem*, page 4905). Congressman

sented the minority views of the Committee, stated that the amount was $100,000,000,000 exclusive of Government securities. *Idem,* page 4534. The President estimated the amount at thirty billions in Government obligations and sixty or seventy billions in private bonds. In his radio address of May, 7, 1933, he said:

> In this connection it is worth while remembering that in the past the government has agreed to redeem nearly thirty billions of its debts and its currency in gold, and private corporations in this country have agreed to redeem another sixty or seventy billions of securities and mortgages in gold * * *.

The typical gold clause calls for payment of interest as well as principal in gold coin. If we take the conservative estimate of the principal amount of $75,000,000,000 of private obligations and assume an average interest charge of five per-cent, we find that the annual interest payable in gold coin in respect of private gold-clause obligations is $3,750,000,000. Assuming an average in-

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Goldsborough estimated the amount at $91,000,000,000, including Government obligations (*Idem*, page 4536). See also the estimate by Turner Catledge, *Gold-Bond Clause Awaits Court Test*, in New York Times, May 7, 1933, Sec. 8. He places the amount at $22,000,000,000 in public obligations and $75,000,000,000 in private obligations. The publication of the Twentieth Century Fund, *The Internal Debts of the United States*, page 253 refers to an estimate of $75,000,000,000 as the total amount of gold-clause obligations outstanding.

terest charge of four percent on the approximately $25,000,000,000 principal amount of public obligations, we find that the annual interest payable in gold coin in respect of such gold-clause obligations is $1,000,000,000.

2. There was a reasonable basis for Congressional determination that the gold clause is contrary to public policy, inconsistent with our present monetary system and an obstruction to the exercise by Congress of its monetary and other powers

The gold clause Resolution is the keystone of our recent fiscal legislation. Its constitutionality can not properly be determined without taking this fact into account. Adherence to gold clauses would have effectually deprived the Congress of the power to assure uniform value to all forms of money; to provide a more effective use of gold reserves, and thus to protect the stability of our currency; to borrow the large sums of money needed for a program of relief and reconstruction; and, finally, to adjust the value of the dollar, in order to relieve serious economic and financial maladjustments at home and to protect our foreign trade against the adverse effect of depreciated foreign currencies.

The title of the Resolution states that it is "To assure uniform value to the coins and currencies of the United States." The preamble recites that the existing emergency has disclosed that gold clauses obstruct the power of the Congress to regulate the value of the money of the United States and are inconsistent with the declared policy of the Congress to maintain at all times the equal power

of every dollar, coined or issued by the United States, in the markets and in the payments of debts. The gold clause is accordingly declared to be against public policy. The significance of this recital, and the reasonableness of the conclusion of the Congress, may be drawn from the following rapid review of the changes in our monetary system, particularly the more recent changes made in view of the financial and economic situation, national and international.

A. Justification of the gold clause was removed when the dual monetary system was ended by the parity provisions

(I) THE DUAL MONETARY SYSTEM

The gold clause had its origins in a period before it was determined that the dual monetary system should not be permitted to continue. The characteristic of this system was that two kinds of money were permitted to circulate, fluctuating in value one against the other. Until 1862 the circulating media consisted of United States coins on the one hand and the circulating notes of the state banks on the other. The Federal Government assumed no responsibility for the value of these notes; the Congress indeed "required the use of coin for all receipts and disbursements of the National government." *Bronson* v. *Rodes,* 7 Wall. 229, 246; 9 Stat. 64.

In 1862, with the passage of the first Legal Tender Act, the dual system was continued, to con-

sist thereafter on the one hand of the United States coins and "demand notes" of 1861–1862,[6] redeemable in coin; and on the other of the state bank notes and United States notes ("greenbacks"). This duality was recognized by the Congress in the Legal Tender Acts and in subsequent legislation. The Legal Tender Acts made greenbacks "legal tender in payment of all debts, public and private, within the United States, *except for duties on imports and interest*" "upon bonds and notes which shall be paid in coin." (Italics ours; c. 33, Sec. 1, 12 Stat. 345.) An Act of June 17, 1864 (c. 127, 13 Stat. 132), declared that thereafter loans of coin should not be made *unless made payable in coin.* An Act of March 10, 1866 (c. 15, 14 Stat. 4), required all returns of income to state whether made in legal-tender currency or in coin; and if in coin, the assessor was to increase the assessment to the equivalent income in paper. Thus, beginning in 1862, the Federal Government provided two kinds of money for two kinds of payments. These two kinds of Federal money also fluctuated in terms of each other. In January 1865, for example, "one dollar in coin was equivalent in market value to two dollars and a quarter in United States notes." (*Bronson* v. *Rodes,* 7 Wall. 229, 230.)

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[6] Act of July 17, 1861, c. 5, 12 Stat. 259; Act of August 5, 1861, c. 46, 12 Stat. 313; Act of February 12, 1862, c. 20, 12 Stat. 338; Act of March 17, 1862, c. 44, 12 Stat. 370.

(II) BRONSON v. RODES

It was during the existence of this dual monetary system that the Supreme Court decided the case of *Bronson* v. *Rodes, supra.* This case will receive attention here because it is the leading case on obligations payable in a particular kind of money. The decision in that case was that the Legal Tender Acts, properly construed, did not make "greenbacks" legal tender for obligations to pay coin. The Court recognized the implications of a system which permitted two kinds of lawful money, fluctuating against each other and available for different kinds of payments; and the reasoning leading to its construction of the Legal Tender Acts rested upon these characteristics of the dual monetary system. The Court developed this view as follows (7 Wall. 252, 254):

> The currency acts themselves provide for payments in coin. Duties on imports must be paid in coin, and interest on the public debt, in the absence of other express provisions, must also be paid in coin * * *.
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> * * * * *
>
> It seems to us clear beyond controversy that the act must receive the reasonable construction, not only warranted, but required by the comparison of its provisions with the provisions of other acts, and with each other; and that upon such reasonable construction it must be held to sustain the proposition that express contracts to pay coined dollars can

> only be satisfied by the payment of coined dollars. They are not "debts" which may be satisfied by the tender of United States notes.

Chief Justice Chase confirmed, in *Hepburn* v. *Griswold,* 8 Wall. 603, 609,[7] the extent to which the characteristics of a dual monetary system influenced the conclusion of the *Bronson* case "in holding that this word [debts], as used in the statute, does not include obligations created by express contracts for the payment of gold and silver, whether coined or in bullion". The Chief Justice, who delivered the opinion of the Court in both cases, stated (p. 609):

> This conclusion rested, however, mainly on the terms of the act, which not only allow but require payments in coin by or to the government, and may be fairly considered, independently of considerations belonging to the law of contracts for the delivery of specified articles, as sanctioning special private contracts for like payments; without which, indeed, the provisions relating to government payments could hardly have practical effect.[8] * * *

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[7] It is true that *Hepburn* v. *Griswold* was overruled by the *Legal Tender Cases*, 12 Wall. 457, insofar as the former held the Legal Tender Acts unconstitutional; but this reversal does not affect the authority of the opinion of Chief Justice Chase insofar as it discusses the rationale of *Bronson* v. *Rodes.*

[8] It should here be noted that the gold clause Resolution explicitly applies to obligations by and to the United States as well as to private obligations.

The Court in *Bronson* v. *Rodes, supra,* recognized the validity of a provision calling for the payment in a particular kind of money of the United States "if * * * no express provision to the contrary be found in the acts of Congress" (see following quotation). That this attitude was determined by the characteristics of the dual monetary system then existing is shown in the following extract from the opinion (pp. 251, 252):

> It follows that there were two descriptions of money in use at the time the tender under consideration was made, both authorized by law, and both made legal tender in payments. The statute denomination of both descriptions was dollars; but they were essentially unlike in nature. The coined dollar was, as we have said, a piece of gold or silver of a prescribed degree of purity, weighing a prescribed number of grains. The note dollar was a promise to pay a coined dollar; but it was not a promise to pay on demand nor at any fixed time, nor was it, in fact, convertible into a coined dollar. It was impossible, in the nature of things, that these two dollars should be the actual equivalents of each other, nor was there anything in the currency acts purporting to make them such. How far they were, at that time, from being actual equivalents has been already stated.
>
> If, then, no express provision to the contrary be found in the acts of Congress, it is a just if not a necessary inference, from the

> fact that both descriptions of money were issued by the same government, that contracts to pay in either were equally sanctioned by law. * * *

Bronson v. *Rodes* may be cited to show that at a time when the United States had a dual monetary system, a contract calling for payment in one kind of money was sanctioned by law in the absence of a contrary determination by the Congress. The reasons given by the Court for the decision have ceased to be operative, and therefore they cannot be regarded as controlling on the question of the validity of gold clauses under our present monetary system. A decision that a promise to pay in gold or silver coin is consistent with the dual monetary system existing at the time of *Bronson* v. *Rodes* is not a decision that a promise to pay in gold coin of a particular standard of weight and fineness is consistent with or valid under a system which has abandoned the dual monetary hypothesis. Still less is it a decision that the Congress lacks constitutional authority to declare gold clauses against public policy or to make currency legal tender for gold coin obligations.

(III) THE PARITY PROVISIONS

The dual monetary system, particularly as it existed in the late 60's and 70's with its disastrous consequences to an orderly economy, ceased to have practical significance after the resumption of specie payments in 1879. Four times since then

the Congress has declared it to be the policy of this country to avoid the evils of two forms of money fluctuating one against the other.

In 1893, the Congress declared it to be the policy of the United States "to continue the use of both gold and silver as standard money", to be protected by "such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payment of debts." (Act of November 1, 1893, c. 8, 28 Stat. 4.)

In 1900, the Congress declared "that the dollar consisting of twenty-five and eight-tenths grains of gold nine-tenths fine * * * shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity of value with this standard, and it shall be the duty of the Secretary of the Treasury to maintain such parity." (Act of March 14, 1900, c. 41, 31 Stat. 45.)

In 1913, the Congress was careful to provide in the Federal Reserve Act that "nothing in this Act contained shall be construed to repeal the parity provision or provisions contained in an Act approved March 14, 1900 * * * and the Secretary of the Treasury may for the purpose of maintaining such parity and to strengthen the gold reserve, borrow gold on the security of United States bonds * * *." (Federal Reserve Act of December 23, 1913, c. 6, Sec. 26, 38 Stat. 251, 274.)

In 1933, shortly before the gold clause Resolution was adopted, the Congress took the culminating step in assuring that the dual monetary system should not return, by making all coins and currencies of the United States full legal tender for all debts, public and private. At the same time the Congress reaffirmed the former parity provisions by declaring that should the standard unit of value be changed by reduction in the weight of the gold dollar "all forms of money issued or coined by the United States shall be maintained at a parity with this standard and it shall be the duty of the Secretary of the Treasury to maintain such parity * * *." (Act of May 12, 1933, c. 25, Sec. 43 (b) (2), 48 Stat. 31, 53.)

With the adoption of the principle that all coins and currencies of the United States should be equal, the gold clause lost the significance and the justification which it had earlier possessed. The parity and legal tender provisions of the Act of May 12, 1933, may have been sufficient, as a matter of law, to render gold clauses unenforceable, but the Joint Resolution was intended to clarify the effect of the Act in that regard. This relation between the two enactments was explained in a Treasury memorandum issued on May 26, 1933:

> A joint resolution was introduced today in both Houses of Congress designed to clarify the effect of recent legislation upon the

status of the "gold clause" in public and private obligations. This resolution has the support of the administration.

Since March 6, when the President declared a bank holiday, transactions involving payments in gold have been brought under control in order to protect and maintain the supply which constitutes a reserve for the Nation's currency. Gold is not now paid, nor is it available for payment, upon public or private debts.

Recently the Thomas Amendment to the Agricultural Relief Act has made all coins and currencies of the United States legal tender for the payment of every debt, public and private. Due, however, to the language used doubt has arisen whether obligations expressed to be payable in a particular kind of money, such as gold coin, may be satisfied by payment in other forms of legal tender.

While the Supreme Court of New York is reported to have held in a recent case that an obligation calling for payment in gold coin could be satisfied by payment of other lawful forms of money [*Irving Trust* v. *Hazlewood,* 148 Misc. 456.] confusion may be created if the existing legislation is differently construed in other jurisdictions. One of the purposes of the resolution is to remove any doubt and to avoid confusion, so that debtors and creditors may have a clear definition of their legal position.

Another purpose of the resolution is to make clear that future obligations, public and private, shall not contain the "gold clause." The Thomas Amendment did not contain specific provision to this effect. Such a provision is contained in the resolution.

The resolution makes it clear that all obligations past and future will be upon the same footing.

B. The gold clause is an obstruction to the exercise of the powers of Congress, as shown by its bearing upon recent legislation designed to cope with the monetary and financial crisis

(1) THE MONETARY AND FINANCIAL CRISIS

The extent to which gold clauses may fetter the Congress in the exercise of its powers is strikingly illustrated by the bearing of such clauses on the recent monetary legislation. Many of the measures enacted, as will be shown, could not have been adopted if gold clauses had not been denounced. But note should first be taken of certain monetary developments in other leading countries and of the outstanding features of our monetary and financial crisis, which called for the enactment of these measures.

Devaluation of Foreign Money Following the War.—In the beginning of 1933 the dollar, the

Swiss franc and the Dutch guilder were the only monetary units of the commercially important countries which were not devalued or depreciated substantially below the parities existing before the World War. The isolated position of the dollar among the units of value of the principal countries with which the United States trades or competes is shown on the following chart:

GOLD VALUE OF LEADING CURRENCIES

1932 Annual Average as Per Cent of Pre-War Parity With Gold

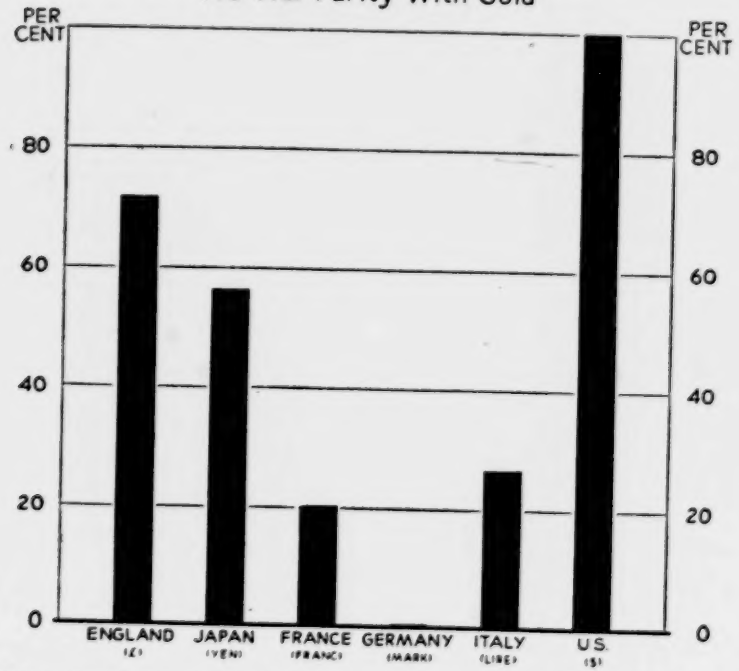

Chart prepared on basis of following table by Division of Statistics and Research, U. S. Treasury Department.

Gold Value of Leading Currencies

[1932 Annual Average as Percent of Pre-War Parity with Gold]

England	71.8
Japan	56.4
France	20.3
Germany	(*)
Italy	26.5
United States	100.0

Sources: *Monetary Units and Coinage Systems of the Principal Countries of the World*, United States Treasury Department, Bureau of the Mint, 1929, pp. 47, 49, 50, 51, 59, 60.

Monthly Bulletin of Statistics, League of Nations, October 1934, pp. 461–463.

Permanent Replacement of the Gold Coin Standard by the Gold Bullion Standard.—Following the outbreak of the World War, England, France, Switzerland, the Netherlands, Belgium and a number of other European countries, placed restrictions upon the export of gold and, in some instances, suspended the redemption of currency in gold coin. *Federal Reserve Bulletin*, August 1928, p. 547. Not one of these countries, upon resumption of the operation of the gold standard, resumed the redemption of its currency in gold coin. A number of the countries followed Great Britain in adopting a gold bullion standard, under which the central bank was obligated to redeem its notes only in bul-

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* By the Monetary Act of August 30, 1924, a new monetary unit called the reichsmark was established. While the reichsmark has the same gold content as the pre-war mark, the act creating the reichsmark provided for the replacement of the existing note circulation at the rate of one new reichsmark for 1,000,000,000,000 (one trillion) old marks. *Monetary Units and Coinage Systems of the Principal Countries of the World, Bureau of the Mint, Treasury Department* (1929), p. 49; D. T. Jack, *The Restoration of European Currencies* (1927), p. 105.

lion in amounts in excess of a specified minimum.[10] The redemption was more in the nature of a sale of gold at a fixed price, since a slight premium over the legal equivalent was charged. This method made for economy in the monetary use of gold by keeping it from domestic circulation while preserving its use in settling international balances. Other countries adopted the gold exchange standard, which gave the central bank the option of redeeming its notes either in gold or in drafts upon gold standard countries.[11]

Collapse of the Price Level.—The bearing of the gold clause on the recent monetary legislation cannot be understood without reference to the striking fall in the price level; or, stated otherwise, the enormous and rapid rise in the purchasing power of the dollar. The World War, of course, brought a tremendous decrease in the purchasing power of the

[10] The gold bullion standard was adopted in England by the Gold Standard Act, 1925; in France, by its monetary law of June 25, 1928. These laws appear in the Federal Reserve Bulletin, June, 1925, p. 375, and August, 1928, p. 570, respectively. The Bank of the Netherlands suspended the regular delivery of gold coins for domestic use on March 31, 1931. See *Annual Report of the Bank of the Netherlands* for the year ending on that date; and *Federal Reserve Bulletin*, August, 1927, p. 596.

[11] Switzerland adopted a foreign gold exchange standard under a Federal law of December 20, 1929. Belgium adopted a similar standard by Royal Decree of October 24, 1926, and by amendments to the By-Laws of the Belgian National Bank of April 10, 1929. These laws and decrees appear in the *Federal Reserve Bulletin*, May. 1930, p. 305; December, 1926, p. 844; and May, 1930, p. 294, respectively.

dollar; but beginning with 1921 and through 1929 the yearly average purchasing power of the dollar remained steady.[12] In the next three years the wholesale commodity price index of the United States Department of Labor declined by nearly 40 percent; that is, a dollar would purchase about once and a half as much in 1933 as it would during 1921–1929.[13]

A chart portraying the collapse in the price level based upon the Department of Labor's monthly indices for the period 1926–1934 is presented below. This chart should be read keeping in mind the fundamentally different significance of a gradual and a rapid price decline. While in either case fixed charges weigh more heavily, a gradual decline, by reason of its slowness, affords debtors, investors, and industries generally an opportunity to make the necessary adjustments. A rapid decline, on the other hand, affords no such opportunity for the economic machine to maintain its equilibrium.

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[12] The purchasing power of the dollar expressed in terms of wholesale prices (1926=$1.00) for all commodities was 1921, $1.025; 1922, $1.034; 1923, $0.994; 1924, $1.019; 1925, $0.996; 1926, $1.00; 1927, $1.048; 1928, $1.034; 1929, $1.049. United States Department of Labor, *Wholesale Prices*, December and Year 1933, Serial No. R–73, page 3.

[13] The purchasing power of the dollar expressed in terms of wholesale prices (1926=$1.00) for all commodities was 1930, $1.157; 1931, $1.370; 1932, $1.543; 1933, $1.517. United States Department of Labor, *Wholesale Prices*, December and Year 1933, Serial No. R–73, page 3.

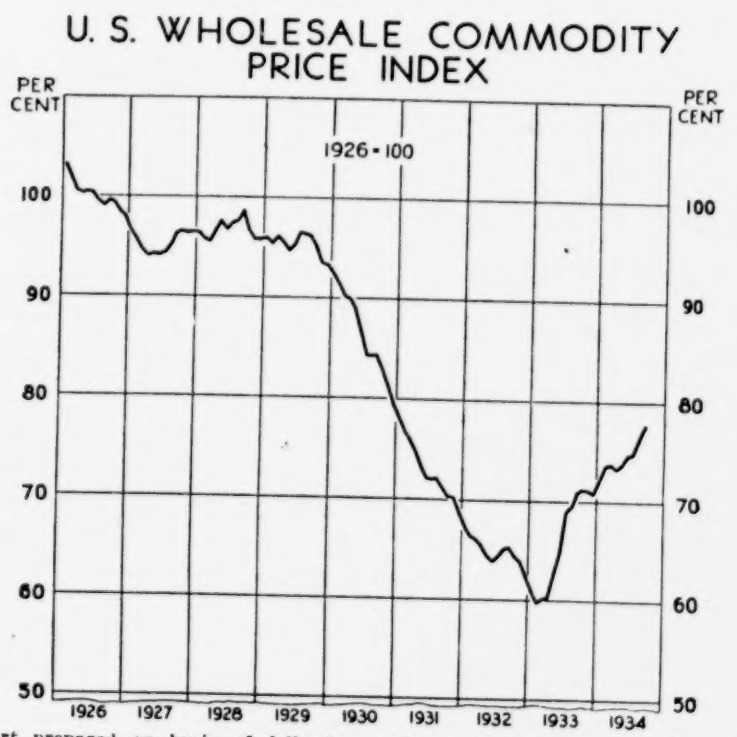

Chart prepared on basis of following table by Division of Statistics and Research, U. S. Treasury Department.

United States Wholesale Commodity Price Index

[1926=100]

	1926	1927	1928	1929	1930	1931	1932	1933	1934
Jan	103.2	96.5	96.4	95.9	92.5	78.2	67.3	61.0	72.2
Feb	102.0	95.8	95.8	95.4	91.4	76.8	66.3	59.8	73.6
Mar	100.6	94.7	95.5	96.1	90.2	76.0	66.0	60.2	73.7
Apr	100.3	94.1	96.6	95.5	90.0	74.8	65.5	60.4	73.3
May	100.5	94.2	97.5	94.7	88.8	73.2	64.4	62.7	73.7
June	100.4	94.1	96.7	95.2	86.8	72.1	63.9	65.0	74.6
July	99.5	94.3	97.4	96.5	84.4	72.0	64.5	68.9	74.8
Aug	99.1	95.2	97.6	96.3	84.3	72.1	65.2	69.5	76.4
Sept	99.7	96.3	98.6	96.1	84.4	71.2	65.3	70.8	77.6
Oct	99.4	96.6	96.7	95.1	83.0	70.3	64.4	71.2	
Nov	98.4	96.3	95.8	93.5	81.3	70.2	63.9	71.1	
Dec	97.9	96.4	95.8	93.3	79.6	68.6	62.6	70.8	
Yr. av	100.0	95.4	96.7	95.3	86.4	73.0	64.8	66.0	

Source: "Wholesale Prices" (monthly bulletins) United States Department of Labor, Bureau of Labor Statistics.

Shrinkage of National Income—Relatively Increased Burden of Long-term Debt Service.—In 1929, our national income was estimated at over 80 billion dollars; by 1932 this had shrunk 50 percent. The annual service on the debts remained fairly constant. The extent to which this debt burden weighed upon our country as a result of the shrinkage of income is illustrated by the following chart and table:

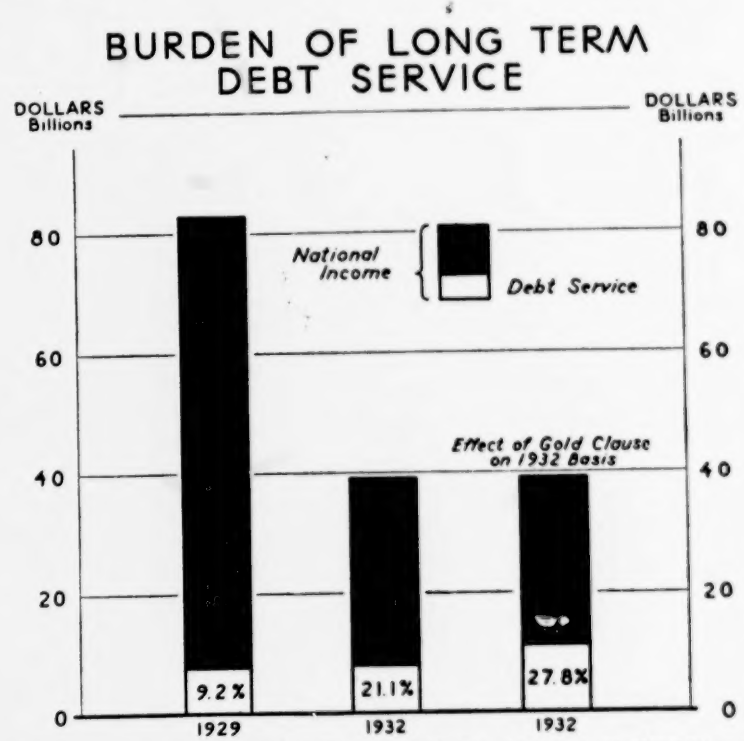

Chart prepared on basis of following table by Division of Statistics and Research, U. S. Treasury Department.

Burden of long-term debt service

[In millions of dollars]

	1929	1930	1931	1932	Debt service as percent of income produced [14]	
					1929	1932
Income paid out:						
Labor income	$52,793	$48,582	$40,896	$31,533		
Property income (interest and dividends)	12,206	12,226	10,498	8,472		
Net rents and royalties	4,116	3,475	2,752	1,865		
Entrepreneurial withdrawals	12,020	11,127	9,102	7,024		
Total income paid out	81,135	75,410	63,248	48,894		
Business savings	1,896	−5,065	−8,604	−9,529		
Income produced	83,031	70,345	54,644	39,365	9.2	20.1

[14] "Known debt service comprises farm mortgage interest payments, accrued interest on funded debt plus amortization and sinking fund charges on the railroad debt, public utility interest charges * * *, and interest charges on the gross public debts plus public debt retirements. Interest charges on urban mortgages, industrial and financial debts are rough estimates based on an assumed average annual interest rate of 6 percent." Total debt service is estimated at $7,642,000,000 in 1929 and $7,910,000,000 for latest available year. If the estimated debt service of 1932, as estimated by Clark, was divided between obligations containing the gold clause and those not containing the gold clause in the same proportions as the total of long-term debt is estimated to be so divided, 55.77 percent of the annual debt service is subject to the gold clause. The enforcement of this clause, by raising the related dollar obligations by 69 percent, would increase the annual debt service on the basis of 1932 estimates from $7,910,000,000 to $10,953,000,000, or by slightly more than 30 percent.

Source: "National Income, 1929-32", Senate Document No. 124, 1934, 73d Congress, 2d Session, pp. 10, 14, for national income; and "The Internal Debts of the United States." Evans Clark, 1933, p. 13, for estimates of the annual debt service and the quotation in note 14.

Disorganization of Foreign Commerce and International Finance.—The decline in our foreign trade which began in 1930 went hand in hand with the increasing restrictions placed by various countries upon the transfer of funds. At the end of 1932 over thirty countries had adopted measures

for the control of their foreign exchange.[15] The contemporaneous decline in our foreign trade is illustrated by the following chart:

[15] Exchange Control as of January 1, 1933.

	Date of Adoption of Exchange Control
Austria	Oct. 9, 1931
Bulgaria	Oct. 15, 1931
Czechoslovakia	Oct. 3, 1931
Denmark	Nov. 18, 1931
Estonia	Oct. 23, 1931
Germany	July 13, 1931
Greece	Sept. 28, 1931
Hungary	July 14, 1931
Iceland	Feb. 17, 1932
Latvia	Oct. 8, 1931
Norway	Informal control by banks since Sept. 29, 1931
Persia	Feb. 25, 1930
Portugal	Oct. 21, 1922
Portuguese East Africa	Apr. 23, 1932
Portuguese West Africa	May 27, 1931
Portuguese Guinea	Feb. 1932
Rumania	May 18, 1932
Spain	July 14, 1930
Turkey (In Dec. 1929 temporary action taken)	Feb. 20, 1930
Yugoslavia	Oct. 7, 1931
Argentina	Oct. 13, 1931
Bolivia	May 19, 1932
Brazil	Sept. 29, 1931
Chile	July 30, 1931
Colombia	Sept. 24, 1931
Costa Rica	Jan. 16, 1932
Ecuador	May 2, 1932
Nicaragua	Nov. 13, 1931
Paraguay	June 29, 1932
Uruguay	May 28, 1931

Source: The above table was computed by the Finance Division, Bureau of Foreign & Domestic Commerce, Department of Commerce, from its special Circulars Nos. 395 and 397.

DECLINE IN FOREIGN TRADE

U. S. Merchandise Trade

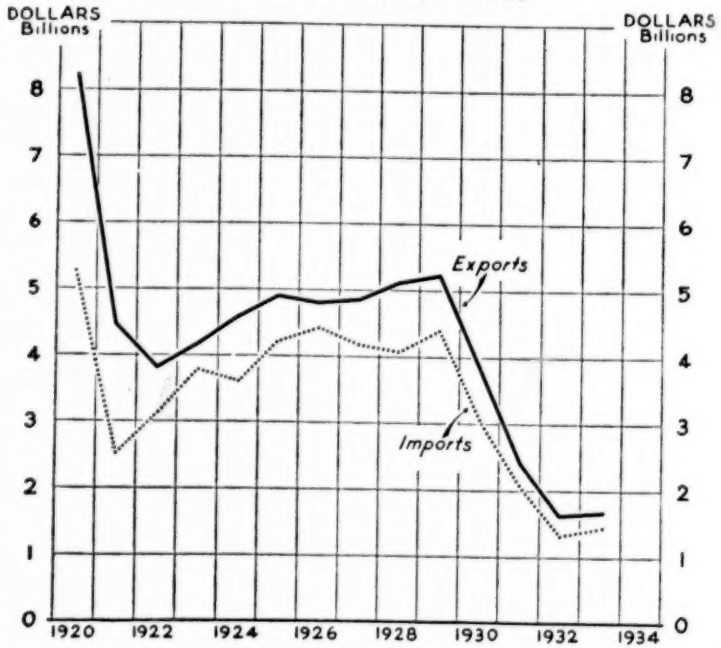

Chart prepared on basis of following table by Division of Statistics and Research, U. S. Treasury Department.

Decline in foreign trade

[U. S. Merchandise Trade—Millions of Dollars]

Year	Exports	Imports	Year	Exports	Imports
1920	8,228	5,278	1927	4,865	4,184
1921	4,485	2,509	1928	5,128	4,091
1922	3,832	3,113	1929	5,241	4,400
1923	4,167	3,792	1930	3,843	3,061
1924	4,591	3,610	1931	2,424	2,090
1925	4,910	4,227	1932	1,612	1,323
1926	4,809	4,431	1933	1,675	1,450

Source: *Balance of International Payments of the United States in 1933*, p. 96, United States Department of Commerce, Bureau of Foreign and Domestic Commerce.

Countries Abandoning the Gold Standard.[16]— Since 1928, one country after another with which the United States trades or competes has abandoned the gold standard. The foreign commerce of the United States was affected most by the abandonment of the gold standard by Great Britain in September, 1931, followed the same year by sixteen other countries. In January, 1933, the pound was quoted in New York at as low as $3.34. Federal Reserve Board, *Daily Statement for the Press, Noon Buying Rates for Cabled Transfers,* January 5, 1933. In terms of the dollar of the old standard, its quotation in New York on November 1, 1934, was $2.94. *Idem,* November 1, 1934. Germany and Italy have not officially suspended gold payments, but have subjected foreign exchange transactions to regulations which, particularly in the case of

[16] The following is taken from "Table IX—Chronological Official Abandonment of Gold Standard", appearing in the League of Nations, Monthly Bulletin of Statistics, October, 1934, page 436:

Argentine	12/16/29	Sweden	9/29/31
Australia	12/17/29	Salvador	10/8/31
Uruguay	12/29/29	Finland	10/12/31
Mexico	7/25/31	Canada	10/19/31
Great Britain	9/21/31	Japan	12/13/31
India	9/21/31	Portugal	12/31/31
British Malaya	9/21/31	Ecuador	2/9/32
New Zealand	9/21/31	Chile	4/20/32
Palestine	9/21/31	Greece	4/26/32
Egypt	9/21/31	Siam	5/11/32
Colombia	9/21/31	Peru	5/18/32
Bolivia	9/25/31	Union of South Africa	12/28/32
Irish Free State	9/26/31	Austria	4/5/33
Denmark	9/29/31	Estonia	6/28/33
Norway	9/29/31		

Germany, have suspended the effect of the operation of the gold standard.[17] France, Belgium, Switzerland, and Holland have maintained the foreign exchange value of their currency at practical parity with gold, but the gold parity of the French franc is only one-fifth of its pre-war parity.

The Withdrawal of Gold and Currency During the Banking Crisis.—During February and until the Proclamation of March 6, 1933, establishing the banking holiday, $476,100,000 in gold was withdrawn from the Federal Reserve banks and the United States Treasury; $311,000,000 for export and earmarking for foreign account, and $165,100,000 for domestic hoarding. Simultaneously the demand for currency for hoarding and export increased the circulation of currency by about $1,840,000,000. *Federal Reserve Bulletin,* April 1933, p. 215. Of greater significance than the amount of the withdrawals in gold is the acceleration, as shown by the accompanying chart on hoarding and gold losses.

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[17] European Financial Notes, No. 173, July, 1934, and special Circular No. 379, October, 1932, Finance and Investment Division, Department of Commerce.

HOARDING AND GOLD LOSSES

Cumulated Increases for Weeks Ended Feb. 8 to Mar. 8, 1933

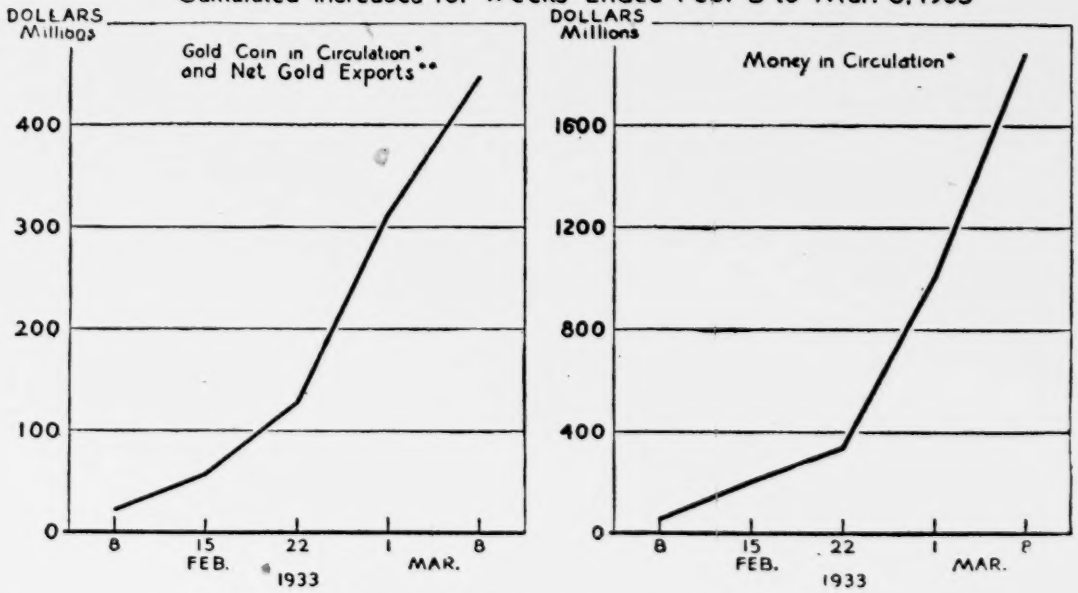

Chart prepared on basis of following table by Division of Statistics and Research, U. S. Treasury Department.

* Source Federal Reserve Bulletin, 1933, page 215.

** Source Federal Reserve Bank of N. Y. Through Federal Reserve Board.

Nor is it without significance that gold clause obligations amounted to approximately $100,000,000,000, while the total available gold reserves of this country were only about $4,000,000,000, in March, 1933, and of the world about $11,000,000,000, (See *Federal Reserve Bulletin,* April, 1933, page 232), a menacing disproportion, particularly in a period of hoarding and stringency.

Hoarding and Gold Losses—Cumulated increases for weeks ended February 8 to March 8, 1933

[Millions of dollars]

Week ended	Gold coin in circulation [1]	Net gold exports [2]	Total gold loss [3]	Money in circulation [1]
Feb. 8	7	15	22	53
Feb. 15	17	39	56	202
Feb. 21	36	91	127	336
Mar. 1	106	206	312	1,067
Mar. 8	140	307	447	1,886

[1] Source: Federal Reserve Bulletin, 1933, page 215.

[2] Source: Federal Reserve Bank of New York through Federal Reserve Board.

[3] In addition to the gold lost through an increase in gold coin in circulation and through gold exports, the Federal Reserve Board estimates that $18,100,000 of gold bullion was hoarded between February 1 and March 4, 1933. $5,000,000 in gold was withdrawn on February 1, 1933; and $6,000,000 in gold was returned between March 4 (when most of the States had bank holidays) and March 8. Thus the totals of gold withdrawn February 1 to March 6, 1933, are as stated in the text, p. 39.

Treasury Department, Division of Research and Statistics.

(II) LEGISLATION DESIGNED TO COPE WITH THE MONETARY AND FINANCIAL CRISIS

To cope with the monetary and financial crisis, to stop first the run on the banks and on the gold reserves of the country and then to attack the causes of the deflation, the relatively increasing debt burden, and the diminishing foreign and domestic commerce, the Congress had to enact legislation of both an emergency and a permanent nature.

The Emergency Banking Act of March 9, 1933, confirmed the President's authority to stop the run on the banks, the withdrawal, export, and hoarding of gold, and the flight of capital into foreign currencies. (See Appendix, page 7.)

An Act of May 12, 1933, authorized the President to reduce the gold content of our monetary unit by as much as fifty percent if he should find that our foreign commerce suffered because we were the only great commercial power which had not yet taken such action, or if he should find it necessary in order to maintain the equality of the different kinds of money of the United States, or if other nations might thereby be induced to stabilize their currencies. The same Act went further to assure the parity of all forms of our money by making every kind of coin and currency issued by or under authority of the United States full legal tender for debts of every description. (See Appendix, page 34.)

The Gold Reserve Act of January 1934 gave more permanent form to these provisions by directing the President to fix the value of the dollar between fifty and sixty percent of its pre-war gold content. This Act also provided for the more effective use of our gold reserves by placing the United States, like England and France, on a gold bullion standard. The Secretary of the Treasury was directed to melt down all gold coins. Future redemptions of currency were to be in gold bullion

and only for the purpose of settling international balances and maintaining the different forms of currency at a parity with one another and with the gold dollar. (See Appendix, page 98.)

The day following the approval of the Gold Reserve Act of 1934, the President, having found that the foreign commerce of the United States was adversely affected by reason of depreciation of various of the currencies of other Governments in relation to the standard value of gold, that an economic emergency required an expansion of credit, and that in order to stabilize domestic prices and protect foreign commerce it was necessary to reduce the weight of the gold dollar, fixed the weight of the gold dollar at 15 5/21 grains nine-tenths fine. The foreign exchange value of the dollar has been stable in terms of gold since that time. *Federal Reserve Bulletin,* October 1934, p. 672.

The Congress adopted an extensive program to provide for relief, to check liquidations and foreclosures, and to stimulate economic recovery, and in order to finance these measures authorized an amount approximately as great as the then outstanding public debt (20 billions) to be borrowed on the credit of the United States. (See page 59, *infra.*)

To supplement our efforts at home, participation with sixty-five other nations in the London Economic Conference of June, 1933, was authorized

(Act of March 4, 1933, c. 282, 47 Stat. 1602, 1611). "For the purpose of expanding foreign markets for the products of the United States (as a means of assisting * * * in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce)", the President was authorized by the Act of June 12, 1934, (c. 474, 48 Stat. 943) to enter into trade agreements and on the basis thereof to increase or decrease duties by as much as fifty percent and to modify other import restrictions. The first agreement under this authority was made with Cuba and provided against restricting trade through exchange regulations (Treaty Series, No. 866, Article XI).

(III) EFFECT UNDER RECENT LEGISLATION IF GOLD CLAUSE ENFORCEABLE

The gold clause in seventy-five billion dollars of private obligations and twenty-five billion dollars of Federal and State obligations, if enforceable, would have restricted the exercise of the powers of Congress so seriously as to make it impossible to put the foregoing legislative program into effect. The Joint Resolution cut the Gordian knot. Gold clauses were declared contrary to public policy, with the result that it was established unequivocally

that the coins and currencies of the United States which were made full legal tender for all debts by the Act of May 12, 1933, were full legal tender at the same value for gold clause as well as non-gold-clause obligations. The reasonableness of this declaration and the appropriateness of the provision that gold-clause obligations might be discharged upon payment, dollar for dollar, in any legal-tender money of the United States is shown, it is believed, by the following illustrations of the ways in which the gold clause, if enforceable, would have obstructed the exercise by the Congress of its powers to regulate the value of the money of the United States and of foreign coin, to regulate foreign and domestic commerce, and to borrow money on the credit of the United States.

(1) THE GOLD CLAUSE—INCOMPATIBILITY WITH THE PARITY AND LEGAL-TENDER PROVISIONS

The gold clause, if valid, would nullify the power of the Congress to make the coins and currencies of the United States legal tender for all payments. The purpose and effect of the clause are to override the legal-tender and parity provisions established by law and to declare that whatever may be the policy of the Congress, the coins and currencies of the United States shall not have equal value in the discharge of particular debts. If the gold clause were allowed, it would be very easy, as was pointed out by Justice Bradley in the *Legal Tender Cases,* "by the use of one or two additional words

to make all contracts payable in specie" (12 Wall. 457, 567). In short, if gold clauses were enforceable, the power of the Congress to establish the parity and equal legal-tender qualities of all forms of money could easily be rendered illusory.

But the gold clause is not merely inconsistent with the parity and legal-tender provisions. It is a serious obstruction to their maintenance. Every tendency toward fluctuation in the relative value of coin and currency is intensified by the special demand for gold coin, created by the existence of gold-clause obligations. While this tendency to disparity may be met through redemption of currency in specie, an undue strain is put upon the system of redemption, which may ultimately break down completely. If the system of redemption must be suspended for any other reason, disparity caused by demands for gold coin to meet gold-clause obligations would be uncontrollable.

Such, in fact, was the situation in 1933, when it became necessary to suspend redemption of the currency. The Government assumed the responsibility of protecting its citizens from the deflation and liquidation involved in a decision to retain, alone among the great industrial, commercial, and agricultural countries, a monetary unit tied to the prewar gold parity.

Anticipation that it might be necessary to break this tie was enough to create a wide-spread desire to convert both demand and time obligations into gold. On February 28, 1933, the money of the

United States outside of the Treasury amounted to a little over $8,000,000,000, of which about $1,000,000,000 was in gold, $6,500,000,000 in paper currency, and the remainder in silver coin. The paper money consisted of $3,500,000,000 of Federal Reserve notes, which are legal obligations of the United States redeemable on demand in gold or lawful money; over $1,000,000,000 of gold certificates, redeemable on demand in gold coin; about $344,000,000 of United States notes redeemable in gold coin of the standard of weight and fineness fixed by the Act of March 14, 1900; and almost one-half billion dollars of silver certificates, which, together with silver coins, the United States has pledged to maintain at a parity with the gold dollar.[18] All these were demand obligations of the United States. To have permitted, after March 6, 1933, the conversion of demand obligations into gold by the redemption of currency would have been to prefer the demand creditors, foreign and domestic, so long as the supply of gold should last. To have prohibited the conversion of demand obligations into gold, and yet to have continued such conversion of the time obligations, gold-clause bonds, would have been to prefer the time creditors, both public and private. To have suspended redemption of the currency and to have continued redemption in gold of the interest and principal of gold-clause obligations would, therefore, have been

[18] Treasury Department, Circulation Statement, February 28, 1933.

to deny the principle of parity and to deny equal treatment to creditors with equal claims to consideration.

(II) THE GOLD CLAUSE—AN OBSTRUCTION TO THE POWER OF THE CONGRESS TO REGULATE THE VALUE OF MONEY

Whether the gold clause is interpreted to require payment in gold coin or to allow creditors to demand an asserted equivalent in currency, the effect of enforcing the clause would be to deprive the Congress of the power to regulate the value of money. The amount of debt evidenced by gold-clause obligations, measured either in terms of a currency equivalent or the cost of procuring gold coin, would be enormously increased as a result of action of the Government in decreasing the content of the gold standard of value. The effect of the gold clause would be not merely to make a large volume of dollar obligations immune to Congressional regulation of the value of the dollar, but to make so serious the consequences of such regulation that the exercise of this power by the Congress would be rendered impractical. The gold clause obstructs the power of the Congress to increase as well as to decrease the value of the dollar. It will suffice, however, to examine the effect of such clauses in the present situation, after the value of the dollar, in terms of gold, was decreased on January 31, 1934, by 40.94 percent and the value of gold, in terms of dollars, increased accordingly by 69.32 percent.

In terms of dollar amounts the gold clauses contained in corporate bond issues and public-debt securities are the most important. In terms of the burden which would be thrown upon debtors were it not invalidated, the gold clause in the mortgages of individuals assumes similar importance. The income of these people, as well as of the public carriers, public-utility corporations, and industrial companies whose obligations contain the gold clause, is in dollars. If these debtors were now forced to pay the asserted equivalent of the dollar of the old standard, the debt burden on their gold-clause obligations would be increased by 69.32%. The increase in the annual interest payments on private gold-clause obligations alone would be about $2,600,000,000 annually, equivalent to a tax per year of more than $20 on every man, woman, and child in this country. This annual increase would be more than twice the total gross market value of all the cotton and all the wheat grown in the United States in 1930, that amount being $1,191,451,000 (See Brandeis, J., in *Liggett Co.* v. *Lee,* 288 U. S. 517, 566, note 55); one and a half times the estimated amount of the dividends and interest paid in the United States in 1932, the latter amount being $1,642,000,000 (*ibid.*); or five times the amount of the total mortgage interest payments in 1932 on all farm-mortgage debts, the latter amount being $510,000,000. (See Twentieth Century Fund, *The Internal Debts of the United*

States, p. 28.) This annual increase would be almost three times the amount of factory wages paid in 1932, the latter amount being $903,000,000. (288 U. S. 517, 566, note 55.)

This potential increase in the debt burden takes on added significance in the light of the already existing burden of long-term debt service. In 1929, our national income was estimated at over 80 billion dollars; by 1932 this had shrunk 50 percent, but the annual service on the debts remained fairly constant. The extent to which this debt burden weighed upon our country as a result of the shrinkage of income is illustrated by the chart and table on pages 34–35, *supra.*

The annual increase in the interest payments on an estimated $25,000,000,000 principal amount of gold-clause obligations of the Federal Government, the States, and municipalities, would be, at the assumed average rate of 4 percent, $695,200,000. In the case of the Federal Government alone, where the average interest rate is about 3½ percent, the increase in the annual service charge on the approximately $20,000,000,000 principal amount of debt outstanding on January 31, 1933, would be nearly one-half billion dollars.

While the added burden of an increased debt charge would fall heavily on many municipalities already faced with the severe problem of decreased income without a corresponding decrease in funded charges, it would fall most heavily on private cor-

porations and individuals. In the case of the home owner and farmer with a gold-clause mortgage, the relief sought for them and for the depositors and investors in institutions holding their mortgages by such Acts as the Emergency Farm Mortgage Act of 1933, the Home Owners' Loan Act, and the Federal Farm Mortgage Corporation Act would be defeated. It would place a burden on the mortgagor which his reduced income in dollars has already been insufficient to meet, and the Government could not afford to relieve the institutions holding these frozen assets at such an increased cost to itself. In the case of the carriers, public utilities and basic industries whose rates are and must be in dollars, the added burden of an enforceable gold clause would bring widespread bankruptcy.

The alternatives, therefore, which the Congress faced were reduction in the content of the gold dollar accompanied by a denunciation of gold clauses, or retention of the old parity accompanied by a recognition of gold clauses. In choosing between these alternatives, the Congress acted for the benefit of the country as a whole, not for that of particular groups or classes of persons.

Reduction i the content of the gold dollar, as proclaimed by the President on January 31, 1934, was designed to protect the foreign commerce of the United States from the adverse effects of the depreciation of other currencies, to stabilize domestic prices, and to encourage an expansion of credit. This action followed substantially similar

action by almost every other commercially important country in the world, as has been shown *supra,* page 30. It resulted, however, in no real loss to holders of unenforceable gold-clause obligations. The drastic decline in the general price level, shown *supra,* page 33, brought about a situation in which a coupon holder who received $10 in 1933 could purchase one and one-half times as much as he could have purchased were his coupon payable in 1921 to 1929. If the gold clause were enforceable, as respondents contend, the coupon holder who received today $16.93 on a $10 coupon could purchase with the proceeds over twice as much as could have been purchased with the $10 during 1921–29. To require the asserted equivalent of gold coin of the former standard would, therefore, result in a profit to bondholders consequent upon governmental action, and would aggravate the situation which that governmental action was expected in part to remedy.

It must be emphasized, finally, that the increase in the debt burden would be no mere incidental consequence of reduction in the gold content of the dollar, but would result from an agreement of the contracting parties conditioned, in effect, upon the exercise by the Congress of its power to regulate the value of money. Claims for the enforcement of gold clauses in terms of the new statutory value of the gold dollar are thus an attempt by creditors to avail themselves, on the one hand, of governmental action with respect to the value of money

and to avoid, on the other, what the Congress rightly regarded as a necessary corollary of that regulation.

(III) THE GOLD CLAUSE—INCOMPATIBILITY WITH LEGISLATION TO PROTECT THE CURRENCY RESERVES AND TO PROVIDE FOR MORE EFFECTIVE USE OF GOLD.

The gold clause, construed as an obligation to pay gold coin, would have prevented, if found enforceable, the monetary legislation designed to protect the currency reserves and to provide a more effective use of monetary gold.

It has been the tendency in the countries of principal commercial importance, as shown *supra,* page 30, to do away with the use of gold in coin and to conserve it as the reserve for the currency system. The United States has enjoyed a very large gold reserve. On March 4, 1933, the monetary gold stocks of this country were $4,242,000,000, of which $3,616,000,000 was in the Treasury and Federal Reserve banks. See *Federal Reserve Bulletin,* April 1933, p. 215. This amount, large as it was, was not considerable compared with the principal amount of the domestic gold clause obligations, aggregating approximately $100,000,000,000, and carrying a service charge aggregating over $4,000,000,000 annually. Moreover, the gold reserves were subject to sudden, violent, and unpredictable withdrawals. As has been shown *supra,* page 39, during February and until the Proclamation of March 6, 1933, about $475,000,000 in gold which could have been used by the Treasury and Federal

Reserve banks for currency reserves was withdrawn; and at the same time the demand for currency for hoarding and export increased the circulation of currency by about $1,840,000,000.[19] The reserve ratio of the Federal Reserve system was reduced from 65.6 percent on February 1, 1933, to 45.1 percent on March 4, 1933. *Federal Reserve Bulletin,* April 1933, p. 211.

The Gold Reserve Act, as has been noted, provided for the complete withdrawal and melting down of gold coin. The withdrawal of gold coin from circulation and the keeping of gold solely in the form of bullion to be used in the settlement of international balances had been advocated by nu-

[19] The abnormal demand for currency generates a vicious circle which is particularly adverse to an effective use of gold in our Federal Reserve system. In periods of hoarding and weakened confidence, banks are reluctant to rediscount eligible paper with the Reserve banks; therefore the collateral for note issues consists, in an unduly large part, of gold; and the amount of "free gold" with which the Reserve banks might engage in open-market purchases of securities, to relieve the situation, is depleted. "In the final analysis, therefore, the reserve base itself is shrunk at the very time when the credit system urgently needs resistance to deflation." L. D. Edie, *The Future of the Gold Standard*, in *Gold and Monetary Stabilization*, 1932 (Q. Wright, ed.), p. 123. This problem of "free gold" led to the enactment of a temporary measure, in 1932, making Government bonds eligible, under certain circumstances, as collateral for Federal Reserve note issues. Act of Feb. 27, 1932, c. 58, 47 Stat. 56, extended by Act of Feb. 3, 1933, c. 34, 47 Stat. 794, and by Act of March 6, 1934, c. 47, 48 Stat. 398, 12 U. S. C., Sec. 412. See Sen. Rep. 237, 72d Cong., 1st Sess., on S. 3616. But the circulation of gold coin and the subjection of gold to withdrawal were fundamental causes of inefficiency in the utilization of monetary gold.

merous economists and bankers.[20] The President, in his message of January 15, 1934, recommending passage of the bill which became the Gold Reserve Act of 1934, said:

> Certain lessons seem clear. For example, the free circulation of gold coins is unnecessary, leads to hoarding, and tends to a possible weakening of national financial structures in times of emergency. The practice of transferring gold from one individual to

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[20] See E. W. Kemmerer, in *Hearings Before the Senate Committee on Banking and Currency, 73d Cong., 2d sess., on S. 2366* (revised ed.), at pp. 206, 208, 224; J. P. Warburg, in *Hearings, supra*, at p. 201; and in *Hearings Before the House Committee on Coinage, Weights and Measures, 73d Cong., 2d sess., on H. R. 6976*, at p. 156; F. A. Vanderlip, in *Hearings Before the House Committee on Coinage, Weights and Measures, 73d Cong., 2d sess., on H. R. 6976*, at pp. 23–24; Pasvolsky, *The Gold Standard Before and After the War*, in *Annals of the American Academy of Political and Social Science* (Philadelphia, Jan. 1933), pp. 173–174; *Report of the Gold Delegation of the Financial Committee of The League of Nations*, C. 502, M. 243, 1932 II. A., pp. 52–56; *Interim Report of the Gold Delegation of the Financial Committee of The League of Nations*, C. 375, M. 161, 1930. II (Geneva, 1930,) pp. 18–20; *Annotated Agenda for World Monetary and Economic Conference, League of Nations Document*, C. 48, M. 18, 1933. II (Geneva, 1933), reprinted in part in Pasvolsky, Current Monetary Issues (Washington, D. C., 1933), pp. 135, 139–145; Sir Otto Niemeyer, *How to Economize Gold*, in *Collected Papers of the Royal Institute of International Affairs, on the International Gold Problem* (London, 1931), pp. 84–93; Sir Arthur Salter, *Recovery—The Second Effort* (N. Y. 1932), pp. 78–79.

> another or from the Government to an individual within a nation is not only unnecessary but is in every way undesirable. The transfer of gold in bulk is essential only for the payment of international trade balances.

This measure could not have been adopted if it had been necessary to make gold coin available to discharge $75,000,000,000 principal amount of private gold clause obligations and $25,000,000,000 of public gold clause obligations.

In this connection the House Committee, which recommended favorable action on the gold clause resolution, stated in its report (H. Rep. No. 169, 73d Cong., 1st sess., p. 1):

> * * * If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence, but in this country virtually all obligations, almost as a matter of routine, contain the gold clause. In the light of this situation two phenomena which have developed during the present emergency make the enforcement of the gold clauses incompatible with the public interest. The first is the tendency which has developed internally to hoard gold; the second is the tendency for capital to leave the country. Under these circumstances no currency system, whether based upon gold or upon any other foundation, can meet the requirements of a situation in which many billions of dollars of securities are expressed in a particular form of the circulating medium,

particularly when it is the medium upon which the entire credit and currency structure rests.

Proof of the incompatibility of the gold clause with the protection of the currency reserves and effective use of gold, is afforded by the experiences immediately before and after declaration of the banking holiday. It has been noted that about half a billion dollars in gold was withdrawn during February and the first four days of March, 1933. The regulations issued pursuant to the Executive Orders of April 5 and April 20, 1933, provided (in Article 5) for licenses for the acquisition from Federal Reserve banks of gold coin or bullion not in excess of the amount of gold coin, bullion, or gold certificates surrendered pursuant to the Executive Order of April 5, 1933, upon the showing of the need for such gold coin or bullion, for "a proper transaction not involving hoarding." The Treasury received such a large number of applications for licenses to acquire gold that the Acting Secretary of the Treasury ruled by an official Treasury telegram to the officers of Federal Reserve banks dated April 28, 1933, that "Until further notice the Secretary of the Treasury will grant no licenses for the acquisition of gold, gold coin or bullion * * * for the purpose of meeting maturing obligations calling for payment in gold coin or bullion, within the United States or elsewhere, except where such applicants have surrendered gold coin, gold bullion or gold certificates in obedi-

ence to the Executive Order of April 5, 1933." (See telegram printed in full on page 21 of the Appendix.) For the Treasury to have ruled otherwise, and to have permitted the payment of gold coin, would have accomplished no useful purpose if the coin were returned by the persons paid, as required by the Executive Order of April 5, 1933; and would have dissipated the gold reserves if the gold were withheld in violation of such order. The legal-tender provisions of the Act of May 12, 1933, and the gold-clause resolution itself, were a logical recognition of this situation. (Note the second paragraph of the Treasury statement quoted on page 27.) They were, in addition, a necessary step preparatory to the permanent measures for more effective use of gold reserves, adopted in the Gold Reserve Act of 1934.

(IV) THE GOLD CLAUSE—AN OBSTRUCTION TO THE POWER OF THE CONGRESS TO BORROW MONEY

On January 31, 1933, the United States had outstanding interest-bearing obligations of a principal amount in excess of $20,000,000,000. Practically all of these obligations either contained a gold clause or came within the purview of statutory provisions for payment in gold coin of the standard fixed by the Act of March 14, 1900, c. 41, 31 Stat. 48; Act of March 18, 1869, c. 1, 16 Stat. 1; Act of February 4, 1910, c. 25, 36 Stat. 192; Act of March 3, 1917, c. 159, 39 Stat. 1000, 1002; Act of March 4, 1917, c. 191, 39 Stat. 1201; Act of April 24, 1917, c. 4, 40 Stat. 35.

The various measures adopted by the Congress for relief and to stimulate economic recovery, called for the expenditure and the borrowing of great sums of money. The authority of the Secretary of the Treasury to borrow money was increased by $10,500,000,000, and agencies of the Government were authorized to issue obligations guaranteed by the United States as to interest, or as to principal and interest, in the aggregate amount of $9,200,000,000.[21]

[21] The amount which the Secretary of the Treasury was authorized to borrow under the Second Liberty Loan Act had already been increased from twenty billion dollars to twenty-eight billion dollars by the Act of March 3, 1931 (c. 433, 46 Stat. 1506).

The Reconstruction Finance Corporation Act of January 22, 1932 (c. 8, 47 Stat. 5, 9, as amended July 21, 1932, c. 520, 47 Stat. 715), had authorized that corporation to issue securities, fully guaranteed by the United States as to principal and interest, to an amount of six and three-fifths times its subscribed capital stock of $500,000,000, giving the corporation an ultimate borrowing capacity of $3,300,000,000, which was increased by later Acts. Early in 1933 it became apparent that further sums of money would be necessary to afford relief and to stimulate economic recovery. The Emergency Farm Mortgage Act of May 12, 1933 (c. 25, 48 Stat. 31), authorized the Federal Land Banks to issue Farm Loan Bonds up to an aggregate amount of two billion dollars, guaranteed as to interest by the United States. The Home Owners' Loan Act of June 13, 1933 (c. 64, 48 Stat. 128), authorized the corporation to issue bonds in an aggregate amount not to exceed two billion dollars, guaranteed as to interest by the United States. This was amended to provide for the guaranty of principal as well as interest, of bonds to be issued thereafter, by the Act of April 27, 1934 (c. 168, 48 Stat. 643). The Gold Reserve Act of January 30, 1934 (c. 6, 48 Stat. 343), increased the amount which the Secretary of the Treasury could borrow against the issuance of notes from $7,500,000,-

After the Act of May 12, 1933, authorized the President to decrease, by as much as fifty percent, the weight of the gold dollar, the Treasury could not issue bonds calling for payment in gold coin of the old standard without knowingly incurring a debt which might ultimately reach twice the amount received on the sale of the bonds. To borrow money upon such terms would have been to favor a few investors at the expense of all the taxpayers. Nor could this dilemma be avoided by leaving the gold clause out of the new bond issues while sanctioning such clauses in outstanding obligations, public or private; since investors, so long as it was anticipated that the President might exercise his power under the Act of May 12, 1933, would prefer the old issues, public or private, to such an extent as to require prohibitive rates upon the new. Furthermore, to have prohibited gold clauses in new obligations while sanctioning them in the old would have been to permit a revival of the dual monetary system of the middle nineteenth century. Senator Fletcher, Chairman of the Committee on Banking and Currency, which reported the gold-clause Resolution favorably, stated:

> The situation cannot be met merely by enabling new obligations to be payable in legal

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000 to $10,000,000,000. The Federal Farm Mortgage Corporation Act of January 31, 1934 (c. 7, 48 Stat. 344), established a Federal Farm Mortgage Corporation authorized to issue and to have outstanding at any one time bonds in an aggregate amount not to exceed two billion dollars, guaranteed as to both principal and interest by the United States.

> tender without creating a difference in value between the old and the new obligations and impairing or destroying the market for new obligations. Investors would no doubt prefer private obligations with a gold clause to Government obligations payable in currency. In other words, we cannot make a distinction. The moment bonds or certificates or notes are offered to the public payable in legal tender, with outstanding obligations of the Government payable in gold, it will be seen that investors would rush to the gold obligations and call for that sort of security and would not take the new certificates or the new debentures or the new bonds or the new obligations. It will interfere both with financing of the Government and financing of private enterprise. *We would pass two different kinds of currency if we were to attempt that.* (77 Cong. Rec., Pt. 5, 4890.) (Italics ours.)

It will be recalled that the Treasury Statement of May 26, 1933 (quoted *supra*, page 26), declared that the purpose of the Joint Resolution was to make it clear that all obligations, past and future, should be upon the same footing.[22]

The provision of the Resolution prohibiting the use of gold clauses in obligations thereafter incurred was necessary in aid of the Government's power to borrow. The United States could not, of

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[22] Both Houses of Congress rejected proposed amendments limiting the application of the Resolution to future issues. 77 Cong. Rec., Pt. 5, pp. 4556, 4890, 4920–21.

course, continue the use of gold clauses in its obligations after such provisions were declared by the Congress to be against public policy. Private debtors might, on the other hand, continue to use such clauses in the hope that at some future time they would be sanctioned by an act of the Congress; and so long as such a possibility existed new issues of public obligations would suffer in comparison with private obligations [23] which enjoyed this speculative element.

(V) THE GOLD CLAUSE—AN INTERFERENCE WITH THE POWERS OF THE FEDERAL GOVERNMENT OVER INTERNATIONAL RELATIONS, FOREIGN EXCHANGE TRANSACTIONS, AND FOREIGN COMMERCE

The month following the introduction of the Joint Resolution, the United States was to join sixty-five other nations in the Monetary and Economic Conference at London. The annotated agenda for that conference invited attention to the disordered state of currencies of the world and the impediments to world trade not only of the fluctuating exchanges but of currencies revalued too high or too low in relation to one another. *League of Nations Document,* C. 48, M. 18, 1933, pp. 13–14. The pendency of the Conference emphasized the fact that if the monetary powers of Congress were to be hampered by the wide-spread use of the gold clause in dollar obligations, the United States could

[23] On June 7, 1933, two days after the approval of the Joint Resolution by the President, the Treasury announced an offering of $900,000,000 in Treasury notes and certificates of indebtedness.

not negotiate on terms of equality with other countries.

The gold clause, if enforceable, would not only impair the powers of the Federal Government to cooperate with the Governments of other countries in respect of monetary and commercial matters, but would weaken the powers of the Federal Government by unilateral action to defend our money and our foreign and domestic commerce from detrimental foreign conditions and policies. The recent financial and economic situation (to certain features of which reference has been made on pages 28 to 41, *supra*) confirmed the fact that particularly in the international sphere our Federal Government must preserve the authority, when circumstances require, to suspend temporarily the functioning of the gold standard, to regulate transactions in foreign exchange, and to regulate the foreign exchange value of the dollar. The crisis which culminated with the Federal banking holiday called for the exercise of each of these powers. Enforcement of the gold clause would have nullified the defensive steps taken with respect to each one.

Following the War, a large number of countries with no gold supplies of their own adopted the "gold-exchange standard"; that is, they promised to maintain their currencies at a parity with gold by redeeming in certain gold-standard currencies. Thus an inverted pyramid was built on the gold reserves of France, England, and this country. With every flurry of confidence, the Central Banks

of these gold-exchange countries rushed to convert their balances into gold.[24] But they were not alone; by March 1933, the successive financial crises in Vienna, Berlin, and London had set loose a quantity of "international capital" which wrought havoc in the foreign-exchange markets.[25] The growing conviction at home and abroad that the United States would soon be forced to stop the downward spiral of prices (see page 33, *supra*) by cutting loose, as practically every other country had done (see pages 29 and 30, *supra*), from the tie

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[24] "America returned to gold at par in 1919 and England in 1925. To maintain the pre-war gold standard, and the then price level above the pre-war level, presupposed the utmost economy in the use of gold. * * * The countries of continental Europe * * * pretty generally adopted the gold-exchange standard * * *. The central banks of such continental countries carried part of their reserves abroad, on deposit with or invested through the Bank of England and the Federal Reserve Bank. That is to say that gold in England and America served as a base not only for the currencies and credit of these two countries, but for those of many other countries. * * *. That facilitated the inflation of the later 1920's and exaggerated the deflation of the early 1930's * * *." Russell Leffingwell, former Assistant Secretary of the Treasury, Proceedings of the Academy of Political Science, Vol. XVI, No. 1, April 1934, p. 73.

[25] "In the series of crises which began in Austria with the failure of the Credit Anstalt in 1931, 'bad' money flew from Vienna, from Berlin, from London, from New York, not in response to the bank rate but in response to fear and to the hope of speculators. The whole world's economy was thus battered to pieces because gold, moving in response to the movement of short funds and fright, had ceased to be a factor of stability and had become a force of disequilibrium." Leffingwell, *supra* note 24, p. 75.

to its pre-war gold unit, a conviction stimulated by the progressive bank closings, started these forces to work. The accelerating currency and gold withdrawals ensued.[26] But if the gold clause were enforceable, it would have been impossible to break the tie to the pre-war gold dollar and so adopt a universally accepted means of stopping the drains upon gold reserves and checking deflation—that is, the suspension of gold payments on currency. But to suspend redemption of five billion dollars of currency would be fruitless if payments were main-

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[26] The crises in Austria and Germany caused withdrawals from London. * * * England's inability to face further deflation had been demonstrated * * * Thus England was forced off gold.

"A year and a half later America was driven off gold too; after three great runs on our gold; after three great resulting waves of panic and deflation, in 1931, 1932, and 1933; long after every other great power, every nation, indeed, except Holland and Switzerland, had abandoned the pre-war standard. America resisted five long months after President Hoover had publicly stated on the authority of the Secretary of the Treasury that the country had once already been within two weeks of going off. * * *

"We had more gold than England; so we could stand the strain longer; and because we could stand it longer, we suffered more. We had more gold and so we had a more topheavy credit structure; and for that reason too we suffered more. The circumstances were different but the ultimate cause was the same. Both countries were forced off by the impossibility of maintaining both the pre-war gold parity of their currencies and the post-war price level; and the impossibility of enduring further deflation of that price level. The burden of debts had become unbearable." Leffingwell, *supra* note 24, p. 76.

tained in gold of the old standard of twenty billion dollars of Federal obligations alone; and would be productive of evils worse than those designed to be cured if payments on both public and private obligations were required to be made in the asserted gold value at a depreciated currency.

The consequences, already indicated, which would attend a reduction in the content of the gold dollar, would necessarily prevent regulation of the foreign exchange value of the dollar. This strikes at the heart of the Congressional power to regulate our foreign commerce. The decline in our foreign trade, noted *supra*, p. 37, was undoubtedly due in part to the adverse effect of depreciated and fluctuating foreign currencies.[27] Foreign exchange rates going heavily against countries purchasing our products must generally result in either fewer purchases or a lower price in dollars paid for the exported products. If the foreign exchange rates against the currencies of countries competing with our own are not equally unfavorable to the foreign

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[27] "If, then, men and nations are to exchange goods and to trade on a constantly increasing scale, one of the first requisites is a common medium of exchange. * * * Widely fluctuating exchange rates and the uncertain value of currencies enormously enhance the risks and difficulties of doing business abroad * * *." Hon. Ogden L. Mills, Former Secretary of the Treasury, Proceedings of the Academy of Political Science, Vol. XVI; No. 1, April 1934; pp. 100, 102.

purchaser, a tendency is created for the trade to be diverted away from us to the competing country.[28] It is important that the dollar be not overvalued or undervalued on the exchanges by virtue of stabilization. On this subject the annotated agenda for the Monetary and Economic Conference, June 1933, contained the following statement:

> The experience of the last decade has shown that the restoration of the gold standard at too low a rate of exchange as well as too high a rate presents grave disadvantages, not only from a national, but also from the international, point of view. (Reprinted in Pasvolsky, *Current Monetary Issues*, pp. 136–137.)

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[28] Whether the volume of exports is decreased, or the amount of currency received for them is decreased, there may be a tendency for domestic prices to drop, because of the increased domestic supply or the effort to compete with other countries. This result is not theoretical or imaginary. A number of authorities have declared that this is precisely what happened in Great Britain upon restoration of the gold standard in 1925 at a level believed to have been too high. See J. M. Keynes, Essays in Persuasion, N. Y. 1932, pp. 244–253; Sir Josiah Stamp, *Papers on Gold and the Price Level*, London, 1932, pp. 18, 110–114; Parliamentary Committee on Finance and Industry, Great Britain (1931), *Minutes of Evidence*, pp. 186–188 (Evidence of Federation of British Industries); John H. Williams, *The World's Monetary Dilemma*, in *Proceedings of Academy of Political Science*, April 1934, pp. 63–64. The extent to which this tendency will affect the domestic situation will depend upon the relative importance of the foreign trade of the country.

(VI) THE GOLD CLAUSE IN OTHER COUNTRIES

The reasonableness of the Congressional determination that the gold clause is against public policy, and the appropriateness of the provision that gold clause obligations may be discharged upon payment, dollar for dollar, in other legal-tender money, are confirmed by the experience of other countries. At one time or another, in connection with the regulation of their monetary systems, various foreign countries have dealt with the question of the gold clause in a manner similar to that adopted by the Congress in the Act of May 12, 1933, and in the Joint Resolution.[29]

3. The resolution is within the powers of Congress

The preceding portion of this brief has sought to demonstrate the reasonableness of the Congressional determination that gold clauses, in both public and private obligations and in both existing and future contracts, obstruct the exercise of Congres-

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[29] See Appendix, pages 149–152, for extracts from statutes or decrees abrogating gold clauses in Belgium, France, Germany, Norway, Roumania, and Sweden. For comparable legislation in other countries, see Arthur Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 Yale Law Journal 53; Madden and Nadler, *Foreign Securities* (1929), Chs. 14, 15; R. L. Garis, *The Gold Clause*, in *Annals of the American Academy*, January 1933, pp. 220–221.

In Great Britain the problem of gold clauses has not been serious, because of the small amount of such obligations there issued. See A. Nussbaum, *La Clause-Or dans les Contracts Internationaux*, in *Recueil des Cours*, 1933, pp. 567, 570; Madden and Nadler, *supra*, pp. 319–320.

sional powers, and are inconsistent with our present monetary system. This portion of the brief will seek to demonstrate that the Congress, under its Constitutional powers to regulate the value of money, to borrow money, and to regulate foreign commerce, has authority to declare against public policy, and therefore unenforceable, contractual provisions which are inconsistent with and obstruct the exercise of those powers.

The scope of the monetary powers of the Congress was described by this Court in *Juilliard* v. *Greenman*, 110 U. S. 421. Mr. Justice Gray there said (p. 439): "The breadth and comprehensiveness of the words of the Constitution are nowhere more strikingly exhibited than in regard to the powers over the subjects of revenue, finance, and currency * * *." It was there pointed out that Congress may impress upon obligations of the United States "such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments" (p. 447). The content of the power granted in the Constitution was examined in the light of the "power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States" (p. 447).

A. Power over the coinage and currency

The Congress has power "To coin Money" and "regulate the Value thereof, and of foreign Coin."

When the framers of the Constitution granted this power, they did not contemplate that the value of money in terms of gold and silver would be fixed unalterably by the First Congress. The power granted was a continuing power and it has been exercised as such. The ratio between the gold and the silver dollar was established in 1792 at 15 to 1. The Act of June 28, 1834, c. 95, 4 Stat. 699, reduced the content of the gold dollar from 27 to 25.8 grains of standard gold. The Act of January 18, 1837, c. 3, 5 Stat. 136, 137, by changing the fineness of the gold in the dollar, increased its gold content. Congress has also exercised its power to regulate the value of foreign coin.[30]

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[30] The Act of July 31, 1789 (1 Stat. 41), fixed the value of the pound sterling at $4.44\frac{4}{9}$. Based upon the relative metallic content of the British and American coins, the parity prior to 1834–1837 would have been $4.54, or about 91_2 cents more than the legal parity. After the new standard of 1834–37 was established, the metallic parity became $4.8665, but legal parity continued at $4.44

By an Act of July 27, 1842 (c. 66, 5 Stat. 496), the value of the pound sterling was fixed at $4.84. By subsequent Act of March 3, 1873 (c. 268, 17 Stat. 602), the value of the pound sterling was changed, in terms of dollars, to $4.8665. This value was to apply not only "in all payments by or to the treasury", but also "in the construction of contracts payable in sovereigns or pounds sterling; and this valuation shall be the par of exchange between Great Britain and the United States; and all contracts made after the first day of January, 1874, based on an assumed par of exchange with Great Britain of fifty-four pence to the dollar, or four dollars forty-four and four-ninths cents to the sovereign or pound sterling, shall be null and void." See *Collector* v. *Richards*, 23 Wall. 246.

The power to alter the content of the coinage carries with it the power, in consequence, to "subject creditors to a corresponding loss." This power was never doubted and was expressly approved in the *Legal Tender Cases*, 12 Wall. 457, 551–552:

> By the act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six percent was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six percent less gold than was required to pay them before. The result was thus precisely what it is contended the legal-tender acts worked. But was it ever imagined this was taking private property without compensation or without due process of law? * * * Other statutes have, from time to time, reduced the quantity of silver in silver coin without any question of their constitutionality. * * *

The power of the Congress to provide for and to terminate the coinage of gold and silver likewise carries with it the power, in consequence, to subject debtors and creditors to a corresponding loss or gain. In 1870 gold and silver were freely coined at the mints, so that one ounce of silver equalled $1.29 in gold or silver coin. By an Act of 1873 (c. 131, 17 Stat. 424, 427) the free coinage of silver was discontinued. In 1890 silver sold at an average market price of $.96804.[31] Thus a person who in 1870 con-

[31] *Annual Report of the Director of the Mint*, 1890, p. 23.

tracted a debt payable twenty years hence, might have expected to be able to satisfy that debt with a dollar of the value of whichever of the metals was the cheaper at the time for payment. The discontinuance of the coinage of silver deprived him of that expectancy.

Not only may the Congress vary the content of the dollar and the terms of the coinage, and so affect the liability of debtors and the recovery of creditors, but it may issue irredeemable paper money which shall be receivable in the discharge of money obligations incurred when only coin was legal tender. This power is unquestionable since the decision in *Legal Tender Cases, supra,* which, together with the later decision in *Juilliard* v. *Greenman,* 110 U. S. 421, goes far to sustain the validity of the Joint Resolution. In those cases it was held that the Congress, by virtue of the power to coin money, to issue bills of credit, to borrow money on the credit of the United States, and to pass laws necessary and proper for the carrying out of those powers, might validly declare that money contracts could be discharged by payment of the face amount of the debts in irredeemable United States notes, even though such notes were greatly depreciated in terms of coined money and even though only gold or silver coin was legal tender for the discharge of the contracts when they were entered into.

The only significant difference between those cases and the one at bar is that there the contracts did not expressly provide for payment in gold or

silver, although such was doubtless the contemplation of the parties when the contracts were made. This difference cannot serve to defeat the power of the Congress to declare what shall be legal tender for the payment of debts. Indeed, it appears more difficult to support the power of the Congress to establish a monetary system in which one dollar may be of a different kind and of varying value, in comparison with another dollar, or good for one purpose and not good for another, as declared in the *Legal Tender Cases,* than it is to support the power of the Congress to ordain that every dollar shall be of equal value with every other in the payment alike of private debts and public dues and that no person may prescribe a particular dollar by contractual provision. It was not doubted that gold-clause obligations were subject equally with other money obligations to the power of the Congress. The only reason why gold clauses continued to be valid after the *Legal Tender Cases* is that the Legal Tender Acts were construed not to apply to them.

Having established paper currency as legal tender, the Congress has power to make that currency effective by requiring that it be receivable at its face value, equally with other money, in the discharge of all obligations. The Congress has power to assure uniform value to the coins and currency of the United States. Such an objective was declared in the Act of November 1, 1893, c. 8, 28 Stat. 4, and in the Parity Act of 1900, c. 41, 31 Stat. 45

(31 U. S. C., Sec. 314). An important step toward the uniformity of all forms of money was taken in the Act of May 12, 1933, as amended by the Joint Resolution, declaring that all coins and currency issued by the United States should be receivable at their face amount in payment of all debts and obligations.

But it was not incumbent upon the Congress to stop with a declaration of the uniform legal-tender qualities of all forms of money. By declaring, in the Joint Resolution, that gold clauses were unenforceable, the Congress took a complementary and necessary step to prevent the placing of a premium upon one form of money by the agreement of private parties. The Congress has in the past sought to achieve uniformity in the value of money by various means. Even before the issuance of legal-tender currency such a purpose had been served by the changes, already referred to, in the ratio between the content of gold and silver dollars. After the issuance of national-bank currency this Court sustained the imposition by the Federal Government of a destructive tax upon the issue of state bank notes for the purpose of driving the latter out of circulation and so relieving national bank notes from competition with them. *Veazie Bank* v. *Fenno,* 8 Wall. 533. A tax similar to that upheld in the *Veazie Bank* case was imposed upon banks which paid out as currency notes of any town, city, or municipal corporation. The tax was sustained by this Court, speaking through Chief Jus-

tice Waite, in *National Bank* v. *United States*, 101 U. S. 1. Still other measures may be taken by the legislature to preserve the efficiency and uniformity of the various forms of money. In *Ling Su Fan* v. *United States*, 218 U. S. 302, this Court upheld a law of the Philippines prohibiting the export of silver coin, which had a greater value as bullion in foreign markets than as coin in the Philippines.

It is clear, then, that in establishing the uniformity of money the Congress may legislate to counteract the effect of market conditions upon the value of money, as in the statutes of 1834 and 1853; to overcome the policy of States; and to counteract the activities of private parties. It is established also that this purpose may be accomplished by taxation, by altering the content of the coinage, by changing the legal tender qualities of money, and by prohibiting the profitable export of coin. No valid reason can be suggested why the Congress, in maintaining the uniformity and efficiency of the various forms of money, may not also counteract the effect of obstructive agreements between private parties and do so by declaring such agreements unenforceable.

B. Power to borrow money

The financial interests of the Government itself have afforded broad scope for legislation. By virtue of the power to borrow money on the credit of the United States, together with the power to pay the debts of the United States, the Congress

has been permitted to establish institutions with Government support and to subordinate the financial interests of private individuals to those of the nation. Thus, although the Constitution granted no express power to create banks, the authority was implied by Chief Justice Marshall from the fiscal powers granted to Congress. *McCulloch* v. *Maryland,* 4 Wheat. 316. Although the Congress has no express power to establish financial institutions to lend money upon farm mortgages, such authority was implied from the power to borrow, where the institutions set up were empowered to act as fiscal agents and as depositaries of public moneys, even though such powers had not been used and it was obvious that it was not the primary intention of the Congress that the institutions should be utilized for such purposes. *Smith* v. *Kansas City Title and Trust Company,* 255 U. S. 180. Although nothing in the Constitution provides that securities of the United States shall be exempt from taxes imposed by a State upon private securities, such exemption was required, largely on the basis of the power of Congress to borrow money. *Weston* v. *Charleston,* 2 Pet. 449; *Missouri Insurance Company* v. *Gehner,* 281 U. S. 313. Although nothing in the Constitution expressly gives the Congress the power to require priority for debts due the United States over debts due to private creditors, such priority was sustained, on the basis of the power to levy taxes, to coin money and to borrow. *United States* v. *Fisher,* 2 Cranch 358. Perhaps the most strik-

ing instance of the subordination of private interests to the borrowing power is afforded by the Legal Tender Acts themselves, which provided a means of meeting Government obligations. There is even greater justification for a measure which requires private creditors to accept currency in satisfaction of all claims, since to require payment of existing obligations in gold or its asserted value would necessitate similar payments on future obligations of the Government itself, and so would subject the taxpayers, in the event of a reduction in the gold content of the dollar, to a liability on Government bonds far greater than the amount received for them by the Government.

C. Power over Foreign Commerce and International Relations

Not only the fiscal powers of the National Government, but its power over foreign commerce and its sovereign power in international relations, afford adequate basis for dealing with gold clauses. As has been shown, the problems to which the recent monetary legislation has been directed are not merely national but are international in scope. The action of one country with respect to its currency is necessarily influenced by that of other nations. In some instances, national action is taken only after formal international conferences and agreements. In such cases it is important that this country be not embarrassed by want of legislative power commensurate with that of other nations in

negotiation or cooperation. Even where no formal international agreement is entered into, the protection of our international monetary position and our foreign trade requires that the United States be in as favorable a position with respect to legislative power as are other countries.

It has been pointed out *supra*, page 38, that on January 1, 1933, twenty-seven countries were off the gold standard and that the currencies of only Switzerland and Holland, apart from the United States, among the important commercial nations of the world, were not depreciated or devalued. It has also been pointed out, *supra*, page 68, that a number of countries, recognizing that obligations should be payable uniformly in legal tender upon the abandonment of the gold standard or revaluation of the gold unit, abrogated or suspended agreements to pay in gold coin.

But the problem of gold clauses is peculiarly American, because of the volume of such obligations executed and payable here. It is therefore particularly necessary for us that gold clauses should not stand in the way of measures, such as the requisitioning of gold coin, the suspension of the gold standard, and reduction in the content of the gold dollar, which serve to place this country in a comparable position in negotiation or competition with others.

The Proclamation of the President reducing the gold content of the dollar contained a finding that such action was necessary "to protect the foreign

commerce against the adverse effect of depreciated foreign currencies." In the past the Congress has frequently legislated with a view to the promotion of our foreign commerce. Acts have been passed providing for the incorporation of export associations, for their immunity from certain provisions of the anti-trust laws, and for the creation of banking associations to facilitate export trade. Sept. 19, 1922, c. 346, 42 Stat. 849, 15 U. S. C., sec. 141; April 10, 1918, c. 50, 40 Stat. 516, 15 U. S. C., sec. 61; Dec. 24, 1919, c. 18, 41 Stat. 378, 12 U. S. C., sec. 611. The Congress may likewise protect the interests of domestic commerce from the effect of imports produced under conditions of advantageous comparative costs. *Hampton & Co.* v. *United States,* 276 U. S. 394. No reason appears why the Congress may not also protect our foreign trade against the adverse effect of governmental action by other countries with respect to their currencies. And in its international relations the Congress possesses the full attributes of sovereignty. *Burnet* v. *Brooks,* 288 U. S. 378, 396; *Legal Tender Cases,* 12 Wall. 457, 555; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711. *Cf. McCulloch* v. *Maryland,* 4 Wheat. 316, 410; *Ruppert* v. *Caffey,* 251 U. S. 264.

It is established, in short, that the Congress may alter the content of the gold dollar; may assure the parity and equal legal-tender qualities of all forms of money; may protect the currency reserves; and,

through monetary measures, may protect the power of the Government to borrow, may safeguard our foreign trade and maintain our equality in international relations.

It was suggested in the court below, by way of answer, that in changing the gold content of the dollar the Congress legislated with a view to adjusting the debt burden of the country. This answer, even if it impeached the power of the Congres, would obviously apply to only a limited portion of the monetary legislation which the Joint Resolution was designed to safeguard. But the answer, even as so limited, does not have the effect which the respondents claim for it. It furnishes, instead, added reason for upholding the legislation.

First, it must be remembered that the suspension of the gold standard followed similar action by practically every great commercial nation of the world; that depreciation of the dollar on the foreign exchanges followed such suspension; and that the Proclamation of the President reducing the weight of the gold dollar brought the statutory value into substantial conformity with the new exchange ratios. Abrogation of gold clauses was, in this aspect, a recognition of the fact that if gold clauses were intended to grant a larger measure of recovery under such circumstances, enforcement of the clauses would result in an insupportable burden of debt, a burden which would have been caused by the action of private parties conditioned upon, and

so obstructing, the action of the Government with respect to the gold value of the dollar. The situation presented by the debtor in the case at bar is but a striking instance of the extent to which the burden of debt would be increased by operation of the gold clause.

Second, while it is true that a decrease in the content of the gold dollar was expected to restore the price level to a point more nearly approaching the level which prevailed before the recent collapse, such an exercise of the monetary power was clearly within the authority of the Congress. In exercising its established power over the content of the dollar, the Congress, it will hardly be denied, was justified in doing so with a view to the needs of the country. The Congress has frequently enacted and this Court sustained legislation passed pursuant to the delegated powers and embodying a national policy. Such exercises of authority have been common under the taxing power, the commerce power, the postal power, and the fiscal powers. *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U.S. 110; *Lottery Case*, 188 U. S. 321; *Mc Cray* v. *United States*, 195 U. S. 27; *Hipolite Egg Co.* v. *United Sstates*, 220 U. S. 45; *Hoke* v. *United States*, 227 U. S. 308; *Billings* v. *United States*, 232 U. S. 261; *Badders* v. *United States*, 240 U. S. 391; and *Hampton & Co.* v. *United States*, 276 U. S. 394.

That the policy of the Congress may have in view the level of prices does not alter the case. Such a

policy has in fact been pursued by several means in the past. The powers of the Federal Reserve Board, particularly in making open-market purchases and sales of Government bonds and in setting rediscount rates for the various Reserve Banks, have and are intended to have an effect upon credit and prices; yet such authority is unchallenged. The statutory requirements for reserves against member bank deposits and against note issues, which the Congress may change from time to time, have an important bearing on the volume of credit and currency. The authority of the Congress to direct the issue of additional currency is unquestioned; yet it might be expected that the effect would be an increase in commodity prices. The protective tariff, which also has and is intended to have an effect upon commodity prices, has been expressly approved, even though it affects commodity prices with more particularity. Insofar as the recent monetary legislation was expected to have an effect on prices, it was not an effort to fix the prices of commodities but rather to enable the normal factors influencing commodity prices to readjust themselves untrammeled by the abnormal price of gold itself.

D. Power over contracts

The power of the Congress to effectuate its legitimate objectives need not be defeated by a supposed necessity of permitting agreements whose purpose and effect would be to frustrate and ob-

struct such power. The Congress may counteract the effect of obstructive agreements and may do so by declaring such agreements unenforceable. Similar power has long and frequently been exercised by the Congress over private agreements which tend substantially to burden interstate commerce or to obstruct the regulation thereof. This Court has stated in vigorous terms, in *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211, 229–230, the reasons why the power of Congress includes not only the supremacy of Federal over inconsistent State legislation but extends also to the regulation of obstructive private agreements:

> If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate interstate commerce, *why should not the power of Congress reach those contracts just the same as if the legislation of some State had enacted the provisions contained in them?* The private contracts may in truth be as far-reaching in their effect upon interstate commerce as would the legislation of a single State of the same character. * * * The power of Congress over this subject seems to us much more important and necessary than the liberty of the citizen to enter into contracts of the nature above mentioned, free from the control of Congress, because the direct results of such contracts might be the regulation of commerce among the States, possibly

quite as effectually as if a State had passed a statute of like tenor as the contract.

The liberty of contract in such case would be nothing more than the liberty of doing that which would result in the regulation, to some extent, of a subject which from its general and great importance has been granted to Congress as the proper representative of the nation at large. * * * (Italics ours.)

See also *Chicago, etc. R. R.* v. *McGuire*, 219 U. S. 549, 567; *Atlantic Coast Line R. R.* v. *Riverside Mills*, 219 U. S. 186, 201; *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253; *United States* v. *Thompson*, *Fed. Cas.* 16489.

In regulating the value of money, no less than in regulating interstate commerce, it is essential that Congress have power to render private agreements illegal where they obstruct or usurp the exercise of Congressional power. It is no answer to suggest that the Congress might exercise unlimited authority over contracts which are payable in money, or over all contracts, on the theory that they affect the value of commodities and so affect the value of money. The question in the present case should not be obscured by supposing the enactment of laws having some fanciful relation to the monetary power of the Congress, because of some remote effect which they may have upon the value of money. The present case involves a type of contract which interferes no less directly and substantially with the regulation of the value of money than do mo-

nopolistic agreements or unreasonable rate contracts with the regulation of interstate commerce. Indeed, it would be difficult to imagine a class of contracts which more directly and substantially affect the regulation of the value of money than do gold clauses of the kind in the case at bar.

This Court has never expressed doubt that gold clauses may be superseded by an Act of Congress. The only reason why such clauses continued to be valid after the *Legal Tender Cases* is that the Legal Tender Acts were construed not to apply to them.[32] Justice Bradley, who differed from the majority of the Court on the question of statutory construction, stated succinctly the reasons why gold clause

[32] It may be noted that the rule of construction adopted in *Bronson* v. *Rodes* was not universally approved. Justice Miller, in his dissent in that case, stated that the decision was opposed "to the decisions of the highest courts in fifteen States in the Union, being all that have passed upon the subject" (7 Wall. 229, 258). In the following cases, state courts not only construed the Legal Tender Acts to make gold-coin obligations payable in "greenbacks" but also either expressly or by implication regarded application of the Acts to pre-existing gold-clause contracts as constitutional: *Reynolds* v. *The Bank of Indiana*, 18 Ind. 467; *Thayer* v. *Hedges*, 23 Ind. 141; *Warnibold* v. *Schlicting*, 16 Iowa 243; *Murray* v. *Gale*, 52 Barb. (N. Y.) 427; *Rodes* v. *Bronson*, 34 N. Y. 649; *Shoenberger* v. *Watts*, 5 Phila. 51; *Shollenberger* v. *Brinton*, 52 Pa. 9; *Mervine* v. *Sailor*, *Davis* v. *Burton*, *Sandford* v. *Hays*, *Graham* v. *Marshall*, *Laughlin* v. *Harvey*, all in 52 Pa. St. 9; *Johnson's Administrator* v. *Vickers*, 1 Duv. (62 Ky.) 266; *Wood* v. *Bullens*, 6 Allen (88 Mass.) 516; *Henderson* v. *McPike*, 35 Mo. 255.

obligations could be validly subjected to such legislation (12 Wall. 566–567):

> It follows as a corollary from these views, that it makes no difference in the principle of the thing, that the contract of the debtor is a specific engagement, in terms, to pay gold or silver money, or to pay in specie. So long as the money of the country, in whatever terms described, is in contemplation of the parties, it is the object of the legal-tender laws to make the credit of the government a lawful substitute therefor. * * *
>
> Hence I differ from my brethren in the decision of one of the cases now before the court, to wit, the case of *Tribilcock* v. *Wilson*, in which the promise (made in June, 1861), was to pay, one year after date, the sum of nine hundred dollars with ten-per-cent. interest from date, payable in specie. Of course this difference arises from the different construction given to the legal tender acts. *I do not understand the majority of the court to decide that an act so drawn as to embrace, in terms, contracts payable in specie, would not be constitutional. Such a decision would completely nullify the power claimed for the government. For it would be very easy, by the use of one or two additional words, to make all contracts payable in specie.* (Italics ours.)

The later history of our monetary legislation has served to confirm what was there said concerning the effect of gold clauses; and the later decisions

of this Court have confirmed the authority of the Congress to declare such agreements unenforceable.

It remains now to discuss the effect of the Fifth Amendment on the application of the Resolution to preexisting obligations.

4. No constitutional limitations are infringed by the resolution

The due process clause of the Fifth Amendment, as applied to legislative action, requires only that the action be not arbitrary or capricious, and that there must be some reasonable relation between it and the legitimate powers of the Congress. The standard of due process has thus been laid down by this Court, in *Ling Su Fan* v. *United States,* 218 U. S. 302, 311:

> To justify the exercise of such a power it is only necessary that it shall appear that the means are reasonably adapted to conserve the general public interest and are not an arbitrary interference with private rights of contract or property. * * *

The familiar standard was repeated in *Nebbia* v. *New York,* 291 U. S. 502, 525:

> And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * *

Cases like *Adair* v. *United States,* 208 U. S. 161, and *Adkins* v. *Children's Hospital,* 261 U. S. 525, relied on below by the respondents, have no direct

application to the case at bar. In those cases, which involved legislative restrictions on liberty of contract, and the question on which the Court divided was whether the restriction was a reasonable means of carrying out the powers of the Congress, in the one case the power over interstate commerce, and in the other the police power over the District of Columbia. The relation of the Joint Resolution to the powers of the Congress, and particularly to the monetary legislation of 1933–1934, has been demonstrated, we believe, in the preceding sections of this brief. The due process clause does not invalidate a law of the Congress which is in accord with the judgment of reasonable men that the abrogation of gold clauses was necessary in order effectively to regulate the value of money. The wisdom of the policy adopted will not, of course, be questioned by the courts. *Hamilton* v. *Kentucky Distilleries Warehouse Co.*, 251 U. S. 146, 161; *Williams* v. *Mayor of Baltimore*, 289 U. S. 36, 42; *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398; *Nebbia* v. *New York*, 291 U. S. 502.

The Joint Resolution of the Congress raises no question of the taking of property without compensation, within the meaning of the Fifth Amendment. Therefore, cases like *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, relied on below by the respondents, have no application. Such cases involve an appropriation by the Government, for its own use, of property belonging to private par-

ties. Compare *Omnia Commercial Co.* v. *United States,* 261 U. S. 502, 513.

The respondents object that the Congress may not take property from one person and give it to another, or directly alter contracts between private parties. The answer to this objection is that there is no taking by the Congress from one person and giving to another, but at most a change in contract rights resulting from an exercise of the delegated powers of the Congress; that such changes have been uniformly upheld when effected by the Congress in the exercise of its paramount powers (see *Lynch* v. *United States,* 292 U. S. 571); and that the Joint Resolution, as has been already established, constitutes an exercise of such power.

Nothing in *Lynch* v. *United States,* 292 U. S. 571, is opposed to these principles. The opinion in that case supports the conclusions which have just been stated. This Court there held invalid a portion of the Economy Act of 1933, which repealed prior laws granting war risk insurance, on the ground that the Congress could destroy existing contract rights against the United States only in the exercise of its police power or other paramount power, and that such exercise was not apparent or even claimed in the case before the Court. Mr. Justice Brandeis, for a unanimous court, said (p. 579):

> As Congress had the power to authorize the Bureau of War Risk Insurance to issue

> them, the due process clause prohibits the United States from annulling them, *unless, indeed, the action taken falls within the federal police power or some other paramount power.*
>
> The Solicitor General does not suggest either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power. * * * (Italics ours.)

In the case at bar, there were supervening conditions, and other legislation to meet those conditions, making the Resolution imperative. It was essential that the declaration of invalidity of gold clauses in private obligations be accompanied by a similar declaration as to Government obligations. See pages 58–62, *supra.*

Even the States, which are specifically forbidden to impair the obligations of contracts, may interfere with or abrogate existing contracts in the exercise of sovereign powers. Laws prohibiting lotteries, the sale of intoxicating liquors, or the maintenance of nuisances, zoning laws, laws regulating rates and services of utilities, and numerous other enactments, may all have the effect of destroying contracts, but they are none the less valid.[33]

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[33] *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 692; *Manigault* v. *Springs*, 199 U. S. 473, 480; *Atlantic Coast Line R. R. Co.* v. *Goldsboro*, 232 U. S. 548, 558; *Chicago & Alton R. R. Co.* v. *Tranbarger*, 238 U. S. 67, 76–77; *Union Dry Goods Co.* v. *Georgia Pub. Serv. Corp.*, 248 U. S.

In *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 435, Mr. Chief Justice Hughes thus summarized this power of the States to affect existing contracts:

> Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. * * *

Even greater power, it has been suggested, is reserved to the Congress to affect contracts, since there is no prohibition in the Constitution against impairment by the national legislature. *Legal Tender Cases,* 12 Wall. 457, 550; *Mitchell* v. *Clark,* 110 U. S. 633; *Evans-Snider-Buel Co.* v. *McFadden,* 105 Fed. 293, 297; *United States* v. *United Shoe Mach. Co.,* 264 Fed. 138, 152.

It is clear, at all events, that no exercise of a paramount power of the Congress has been invalidated because it interfered with or destroyed existing contracts. Numerous Acts of Congress having such purpose and effect have been sustained. A familiar example is Federal bankruptcy legislation. See *Hanover National Bank* v. *Moyses,* 186 U. S. 181.

372, 376; *Producers Transp. Co.* v. *R. R. Comm. of California,* 251 U. S. 228, 232; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242; *Sutter Butte Canal Co.* v. *Railroad Comm.,* 279 U. S. 125, 138; *Stephenson* v. *Binford,* 287 U. S. 251, 276; *St. Paul Fire & Marine Ins Co.* v. *Eldracher,* 33 F. (2d) 675 (C. C. A. 8th), cert. den., 280 U. S. 604.

But other legislation may also affect or destroy existing contracts. Thus in *Louisville & Nashville Railroad* v. *Mottley,* 219 U. S. 467, a law was upheld, as applied to prior contracts, which prohibited the use of free passes on interstate railroads. In that case, the pass, which had been given a number of years before, was not a mere gift but was in the nature of a satisfaction of a disputed claim against the railroad for personal injury. Hence, there was a clear abrogation of an existing contract by Federal law.

In *Philadelphia, B. & W. R. R. Co.* v. *Schubert,* 224 U. S. 603, the Court upheld the power of Congress in the Employers' Liability Acts to abrogate existing contracts making receipt of benefits under a company relief plan a bar to an action for damages. In that case, the plaintiff became a contributor to such a fund before the enactment of the Act of Congress, and received a benefit from the fund after the Act became effective. In holding that he was not barred from bringing action for damages, in the face of the prior agreement, the Court, through Mr. Justice Hughes, said (pp. 613–614):

> The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the Federal au-

> thority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. *Prior arrangements were necessarily subject to this paramount authority.* (Italics ours.)

In *Calhoun* v. *Massie,* 253 U. S. 170, this Court upheld an Act of Congress limiting the fees which could be charged by attorneys representing claimants of Civil War benefits. In that case the attorney's contract had been made and the major part of his services had been performed before the Act was passed. The Act, nevertheless, was held valid as applied to that contract.

And in *De Laval Steam Turbine Co.* v. *United States,* 284 U. S. 61, it was held that existing contracts are subject to an Act authorizing their requisition by the Government.

The power of the Congress may be exercised in such a way that even contracts between private parties and a State may be abrogated. Thus in *New York* v. *United States,* 257 U. S. 591, this

Court upheld an order of the Interstate Commerce Commission increasing an intrastate rate even though the state charter of the railroad provided that a lesser rate should be the maximum charged by the company. See also *Omnia Commercial Co.* v. *United States,* 261 U. S. 502; *Scranton* v. *Wheeler,* 179 U. S. 141; *Union Bridge Co.* v. *United States,* 204 U. S. 364.

In *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374, Justice Holmes tersely said:

> The operation of reasonable laws for the protection of the public cannot be headed off by making contracts reaching into the future.

And in the case of *Norman* v. *Baltimore & Ohio R. Co.* (265 N. Y. 37, 191 N. E. 726, 728; No. 270, (this term) Chief Judge Pound stated:

> All arrangements for payment in money in the future are necessarily under the paramount authority of the political sovereign delegated powers of Congress. The courts should not interfere with the economic policies adopted by Congress, if such powers are vested in that body. * * * If the gold clause in contracts is an interference with the ability of the government to accomplish legitimate results it may well be urged that Congress may remove such interference without regard to consequences.

"But", said District Judge Faris, in the court below (R. p. 120), "learned counsel for intervenors, in both their oral and printed arguments, do insist, most ably and strenuously, that no public policy is

at all involved in a matter of private contract between a corporation and individual bondholders as here", and added:

> I submit with deference, that they have in this assumption fallen into grave error, in my opinion. Their conclusions upon the point are tantamount to the assertion, that any two members of our national compact bottomed as it is, on representative government may flout and disobey both the organic law and the mandate of their government, and arrogate to themselves a power which, as I labor to show, has been solemnly committed to the Congress alone. If this may be done by two contracting parties in any given contract, I see no reason why it may not be done in every contract; with at least, the theoretical result, to turn business and commerce back to ancient barter, or swapping of commodities. * * * Obviously, no two persons can by a private contract directly repeal a law passed by the Congress, and so by the same token they cannot do so by indirection.

These principles have been vigorously reaffirmed by this Court in a recent case. In *Sproles* v. *Binford*, 286 U. S. 374, Mr. Chief Justice Hughes said (pp. 390–391):

> With respect to the power of Congress in the regulation of interstate commerce, this Court has had frequent occasion to observe that *it is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy,*

> as such a restriction would place the regulation of interstate commerce in the hands of private individuals and *withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements.* (Italics ours.)

The power over the currency must be no less free than the power over interstate commerce from the fetters of "existing arrangements". This is particularly true where, as in the case of clauses calling for gold coin of a particular standard, the existing arrangements were designed to frustrate future legislative action. The "prophetic discernment" of private individuals cannot be allowed in such a case to defeat the legitimate policy of the Congress.

5. The Joint Resolution is controlling in the case at bar

The Resolution applies in terms to every "obligation payable in money of the United States." The respondents do not deny that the bonds in the present case constitute such obligations. The fact that the bonds contain a gold clause does not make them any the less money obligations. As was said in *Thompson* v. *Butler,* 95 U. S. 694, 697, a gold-clause obligation "is a contract to pay money, and none the less so because it designates for payment one of the two kinds of money which the law has made a legal tender in discharge of money obligations." To regard gold-clause obligations as other than money contracts would throw grave doubt

upon their negotiable character, since the Negotiable Instruments Law requires that such instruments be payable in "a sum certain in money".[34]

The effect of the Resolution is that the bonds in the present case may be discharged by payment of their face amount in lawful money. The application of the Resolution is not affected by the fact that the bonds matured on May 1, 1933. The Resolution provides for the discharge of every money obligation by such payment, dollar for dollar, irrespective of agreements to pay in gold coin or the value thereof. The obligation continued, after May 1, 1933, to be one to pay according to the face of the bonds; it did not become at that time one to pay a different amount as damages for breach. Compare *Hicks* v. *Guinness,* 269 U. S. 71, with *Deutsche Bank Filiale Nurnberg* v. *Humphrey,* 272 U. S. 517.

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[34] The bonds and the mortgage indenture under which the bonds were issued abound with evidence that the obligation of the Railway Company is an "obligation payable in money of the United States." Article First of the indenture provides that "the amount of the bonds * * * is limited so that there shall never at any time be outstanding under this indenture bonds having an aggregate principal sum exceeding Fifty Million Dollars ($50,000,000)." In Article Eleventh it is provided that the mortgage shall be discharged when the company shall have "paid the whole amount of the principal moneys and interest due upon all of the bonds." Articles Third and Thirteenth assume that the coupon bonds and the coupons are negotiable. Article Third makes the coupon and registered bonds exchangeable, dollar for dollar.

But even if it be assumed that the obligation became, on May 1, 1933, one to pay as damages a liquidated sum greater than the face amount of the bonds, the Joint Resolution is none the less applicable. The Resolution not only provides the manner in which money obligations shall be discharged, but declares gold clause provisions to be against public policy. It will not be denied that in substance the claim of the Respondents is based upon gold clause obligations, whether or not the fact of maturity alters the technical obligation. The courts will not enforce claims based upon agreements which have been declared by the legislature to be contrary to public policy. Compare *Oscanyan* v. *Arms Co.*, 103 U. S. 261; *Ewell* v. *Daggs*, 108 U. S. 143; *Calhoun* v. *Massie*, 253 U. S. 170; *Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. Ry. Co.*, 62 Fed. 904, 910.

We do not understand the respondents to deny the applicability of the Joint Resolution.

II

Independently of the Joint Resolution there is no basis for allowing the respondents' claim in other than the face amount of the bonds

1. Analysis of the argument

We have maintained thus far that the Joint Resolution of June 5, 1933, is constitutional and controlling in the case at bar. There is, however, an independent basis for holding that the obligations in the bonds can be satisfied by payment of their stated dollar amount in legal tender. Re-

gardless of the constitutionality or the applicability of the Joint Resolution, it is our contention that the Congressional Acts and the executive and other administrative orders and regulations relating to the ownership, use, and transfer of gold coin, gold bullion, and gold certificates have so affected the gold market that there is no justification for computing the amount of the respondents' claim on the bonds at more than their face value. Thus the results achieved directly by the Joint Resolution follow indirectly from the effect of the gold orders upon the availability and market value of gold.

It is clear that the gold clause involved in the case at bar is a money obligation and not a commodity obligation.[35] Upon the assumption that the clause is a money obligation, two general interpretations are possible: It may call (a) simply for payment in gold coin, or (b) for payment in gold coin or in the alternative for payment in currency of an "equivalent" amount.

In our view, for the reasons stated *infra* pages 114 to 123, the first interpretation is the proper one; but upon either interpretation the respondents' claim is no greater than the face amount of the bonds.

If, as we believe, the clause is a single obligation to pay in gold coin, such a mode of payment would be excused outside of the bankruptcy proceedings because of supervening illegality and impossibility,

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[35] See page 96 and note 34, *supra*.

and recovery would be limited to the face amount of the bonds, upon principles of partial enforcement or quasi-contractual restitution. The claim in bankruptcy should be no greater. Moreover, even if payment were made in gold coin, the creditors could not realize upon such coin more than the nominal amount thereof in any legal tender money; consequently, to allow a greater claim in these proceedings would be to permit greater recovery as a result of breach than as a result of performance.

If, however, the court should be of the opinion that there must be implied in the clause a provision for an alternative payment in some equivalent of the stipulated gold coin, the respondents' claim is equally unsound. Equivalence should be defined in terms of the amount which a gold clause creditor could realize upon the stipulated gold coin; and this, as has just been stated, has at no time been greater than the nominal amount of the debt. But even if some other concept of equivalence is adopted, such as the statutory price of gold, having no relation to the amount which a gold clause creditor could realize upon gold coin, the result is the same. Under this last interpretation the question of the date as of which the equivalent should be determined becomes controlling. We believe that the proper date is May 1, 1933, the due date of the bonds, and at that time any legal tender money was, dollar for dollar, the equivalent in this country of gold coin, no matter how it was acquired, and no

matter whether equivalence is determined by statutory price or by the price available in the restricted market then prevailing.

2. Analysis of the gold market as affected by Congressional Acts and by the gold orders

The gold market was first affected by the Presidential Proclamation of March 6, 1933 (Appendix, p. 2), which declared the "bank holiday." [36] The Proclamation forbade banks to export, to pay out, or to permit the withdrawal or transfer of any gold coin, gold bullion, or gold certificates, except as prescribed by the Secretary of the Treasury. Orders of the Secretary of the Treasury (Appendix, p. 5), approved by the President and issued on the same date, directed the Treasurer of the United States and the Director of the Mint to permit the withdrawal of gold in any form only under license issued by the Secretary of the Treasury. These steps were confirmed by the Act of March 9, 1933 (Appendix, p. 7). An Executive Order of March 10, 1933 (Appendix, p. 11), authorized the opening of banks under license but provided that the banks should continue the restrictions relating to the paying out of gold "except as authorized by the Secretary of the Treasury." Regulations issued by the Secretary of the Treasury pursuant to the author-

[36] The "bank holiday", declared for three days by the Proclamation of March 6, was continued under the authority of the Act of March 9, 1933, "until further proclamation by the President." A proclamation officially terminating the "bank holiday" has not yet been issued.

ity conferred upon him by the President's Orders relaxed the restrictions specified therein in one respect only: On March 13, 1933, Federal Reserve banks were authorized (Appendix, p. 13) to deliver limited amounts of gold for legitimate and customary use in industry, profession, and art upon receipt of affidavits stating the need of the gold for such use. Briefly, therefore, the effect of the Orders of the President and regulations of the Secretary of the Treasury was that gold could not be withdrawn in any form from banks, the United States Treasury, or the United States Mints and Assay Offices except for industrial, professional, or artistic purposes; and that this and other gold in circulation could not be exported. There were no restrictions upon the ownership or free circulation within the country of gold coin, gold bullion, and gold certificates already outside the banks.

On April 5, 1933, the President issued an Order (Appendix, p. 14) forbidding the hoarding of gold coin, gold bullion, and gold certificates. By the regulations contained in this Order all persons were required to deliver to appropriate banks on or before May 1 all gold coin, gold bullion, and gold certificates, exceeding $100 in aggregate amount, "now owned by them or coming into their ownership on or before April 28, 1933", and thereafter they were required to deliver such gold within three days after receipt thereof. Payment for such gold was authorized in "an equivalent amount of any other form of coin or currency, coined or

issued under the laws of the United States." Provision was made in the Order for exceptions, under license, to this requisition of gold for (1) gold required for industrial, professional, or artistic uses, and (2) "gold coin and gold bullion licensed for other proper transactions (not involving hoarding)." [37] This Order should be considered together with the Executive Order issued on April 20, 1933 (Appendix, p. 18), which prohibited the export of gold but provided for export under license, "with the approval of the President for transactions which [the Secretary of the Treasury] may deem necessary to promote the public interest." [38]

[37] Similar exceptions, for purposes unrelated to the instant case, were made for (1) "rare coins", and (2) "gold coin and bullion, earmarked or held in trust for a recognized foreign government, for a foreign central bank, or for the Bank of International Settlements."

[38] Similar exceptions, for purposes unrelated to the instant case, were made for (1) gold coin and bullion "earmarked or held in trust" in the same manner as described in the preceding footnote; (2) "gold and bullion imported for re-export or in reasonable amounts for usual trade requirements of refiners importing gold bearing materials under agreement to export gold": (3) "gold coin and bullion actually required for the fulfillment of any contract entered into prior to the date of this order by an applicant who, in obedience to the Executive Order of April 5, 1933, has delivered gold coin, gold bullion, or gold certificates." This last exception is deemed inapplicable to the instant case, since there is no suggestion in the record or argument that the respondents were in a position to avail themselves of it. Furthermore, it has no bearing on the existence of a free gold market.

That these exceptions to the April Orders were not intended to modify the strictness of the original Orders as they applied to gold for monetary purposes was demonstrated by a ruling of the Secretary of the Treasury on April 28, 1933 (Appendix, p. 21). To forestall applications in cases in which licenses would not be granted, the Secretary ruled that no licenses would be granted under the Executive Order of April 5, 1933, "for the purpose of meeting maturing obligations calling for payment in gold coin or bullion, within the United States or elsewhere, * * *."[39] The effect of this ruling and the regulations (Appendix, p. 22) issued on April 29, 1933, pursuant to the Executive Orders, was to delimit "proper transactions" in the Order of April 5 and generally to forbid ownership or circulation of gold either as coin or as bullion except as a commodity for industrial, professional, or artistic uses. The export of gold was similarly restricted.[40]

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[39] The ruling continues: "* * * except where such applicants have surrendered gold coin, gold bullion or gold certificates in obedience to the Executive Order of April 5, 1933." The irrelevancy of such an exception has already been discussed in the preceding footnote.

[40] The ruling of April 28, 1933, did not by its terms apply to the Order of April 20. But in view of the provision of the ruling prohibiting the withdrawal of gold for payment "within the United States *or elsewhere*", it is unlikely that the export of gold to meet gold-clause obligations would be licensed under the exception in the Order for transactions "necessary to promote the public interest."

Under the Order of April 5, 1933, any person acquiring gold after May 1 was required, subject to the exceptions noted above, to deliver such gold to a Federal Reserve bank "within three days after receipt thereof", unless such delivery involved "extraordinary hardship or difficulty", in which case the Secretary of the Treasury might "in his discretion, extend the time within which such delivery must be made." See Sections 3 and 7 of the Executive Order of April 5, 1933. This requirement placed a duty upon the persons [41] which was performed only by delivery of gold to a Federal Reserve bank. The duty could not be avoided by delivery to a third person. Similarly, although the President did not specifically avail himself of the power contained in the Act of March 9, 1933, to prohbit the melting of gold, the duty to deliver could not be avoided by a change in the form of gold coin. The only gold which circulated lawfully was gold held and sold as a commodity for industrial, professional, or artistic uses. Gold for this purpose could be acquired at the legal rate of

[41] "The Executive Order of April 5, 1933, is in terms made applicable only to the *owners* of gold coin, gold bullion, and gold certificates * * *. The Executive Order therefore operates *in personam*, not *in rem*, upon the persons designated in the Order rather than upon the gold required to be delivered by the Order." Opinion of the Attorney General of the United States, *Executive Order Prohibiting the Hoarding of Gold Coin, Gold Bullion, and Gold Certificates*, May 25, 1933.

$20.67 an ounce from the Federal Reserve banks.[42] The scrap arising from this and other gold was sold to the United States Mints at the same rate.

On and after May 1, therefore, as a practical matter, the export, ownership, and free circulation of gold coin and gold bullion was restricted in this country to gold genuinely held as a commodity for industrial, professional, or artistic uses. There was no market for gold for monetary purposes.[43]

On May 1, 1933, when the bonds in the instant case matured by their terms, the price of gold in terms of dollars had risen slightly in the foreign free markets, and thereafter continued to rise. This, however, did not affect the price of domestic gold in any respect. Gold coin and certificates, whether offered voluntarily or pursuant to the requisition Orders, and whether imported or held in the United States, were paid for, dollar for dollar, in lawful money of the United States by the Federal Reserve banks and by the United States Treasury and Mints; and gold bullion was like-

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[42] Regulations of April 29, 1933, Art. II, sec. 3, Art. V, sec. 4; see Appendix, pp. 23, 24.

[43] The Treasury Statement of May 26, 1933, *supra*, p. 27, pointed out that "gold is not now paid, nor is it available for payment, upon public or private debts." The Report of the Senate Committee on Banking and Currency, dated May 27, 1933, on S. J. Res. 56 stated: "By the Emergency Banking Act and the existing Executive Orders, gold is not now paid, or obtainable for payment, on obligations public or private."

wise paid for in lawful money at the statutory rate of $20.67 an ounce, whether or not required to be delivered. Similarly, gold bullion, no matter how acquired, was sold to licensees at $20.67 an ounce. In consequence, the same price prevailed in the secondary markets. The export of gold to profitable foreign markets was, of course, impossible by virtue of the restrictions on gold export.

On August 28, 1933, the Executive Orders of April 5 and April 20, were superseded by an Executive Order (Appendix, p. 40) which for the most part carried over the provisions of those Orders, but in addition provided that gold might be acquired in the United States only under license and only from sources specified by the Secretary of the Treasury. Licenses to acquire gold could be issued (1) for legitimate and customary use in industry, profession, or art; (2) for export after such export had been licensed pursuant to another provision of the Order.[44] Licenses to acquire gold for export could be issued for purposes similar to those specified in the Order of April 20, 1933, including the export of gold, "with the approval of the President for transactions which the Secretary of the Treasury may deem necessary to promote the public

[44] A similar exception for a purpose unrelated to the instant case was made for gold for a "necessary and lawful transaction" when the applicant for the license had, since March 9, 1933, "surrendered an equal amount of gold coin, gold bullion or gold certificates." See *supra*, page 103, note 38.

interest." It is apparent that the licensing provisions left no possibility for the acquisition of gold in any form for domestic use in meeting maturing obligations calling for payment in gold coin or bullion, or for circulation in general; and the approval of the Joint Resolution on June 5, 1933, is sufficient indication that the export of gold coin for such purposes would not be deemed "necessary to promote the public interest."

The Order of August 28, 1933, dealt also with the holding and ownership of gold. It provided that no person could hold or own any gold coin, gold bullion, or gold certificates except "under a license heretofore granted" or under a license provided for in the Order, after thirty days from the date of the Order.[45] Licenses to hold gold could be issued (1) for legitimate and customary use in industry, profession, or art, or (2) when the Secretary of the Treasury was satisfied that such gold was "required by the person owning the same for a necessary and lawful transaction for which currency other than gold certificates cannot be used."[46]

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[45] No licenses were required for certain specified purposes, unrelated to the instant case; namely, for (1) gold "in an amount not exceeding in the aggregate $100 belonging to any one person"; (2) rare coins; and (3) gold owned by Federal Reserve banks.

[46] Similar exceptions for purposes unrelated to the instant case were made for (1) gold "earmarked or held in trust" since before April 20, 1933, for a recognized foreign government, or foreign central bank or the Bank for International Settlements; and (2) gold "imported for reexport or held pending action upon application for export licenses."

It has earlier been demonstrated that licenses under prior Orders would not be granted to permit the circulation of gold, and after the approval of the Joint Resolution of June 5, 1933, such a purpose would not be deemed to be "necessary and lawful." Although thirty days from the date of the Order were allowed to elapse before the penalty provisions attached to the holding of gold, this did not enable gold to circulate. The thirty-day period did not apply to gold unlawfully held under prior Orders. Furthermore, persons were allowed to acquire gold only under a license, from persons holding it lawfully during the thirty days and then only if acquisition from such persons was authorized in the licenses. Payment or transfer of gold for monetary purposes during this period would therefore be out of the question. Even if gold coin lawfully held during this period were melted down, the bullion could not be transferred, and its use at the expiration of the period in industry, profession, and art would be licensed only if the holder of the bullion could show "legitimate and customary use" in his business.

On August 28, 1933, therefore, the acquisition, export, ownership, and free circulation of gold coin, bullion, and certificates were effectively restricted. A free domestic market for gold was nonexistent under this Order as under the April Orders, and domestic gold could still not be sold in the world markets.

The Executive Order of August 29, 1933, (Appendix, p. 49), indicated a departure in a restricted sphere from the stationary price described above. The Secretary of the Treasury was authorized "to receive on consignment" newly mined domestic gold (1) for sale "to persons licensed to acquire gold for use in the arts, industries, or professions"; and (2) for sale "to foreign purchasers." These sales of newly mined gold were to be made at a price "equal to the best price obtainable in the free gold markets of the world." Gold coin and certificates when surrendered were still being paid for, dollar for dollar, in lawful money of the United States; and gold bullion was likewise paid for at $20.67 an ounce. Similarly, gold coin continued to be sold by the United States and the Federal Reserve banks to licensees, dollar for dollar, and bullion at $20.67.[47]

On November 16, 1933, Judge Woolsey decided in the case of *Campbell* v. *Chase National Bank,* 5

[47] On October 25, 1933, the Executive Order of August 29 was replaced by a new Executive Order (Appendix, p. 78) which authorized the Mints to receive newly mined gold on consignment for the Reconstruction Finance Corporation, and authorized that Corporation to acquire gold so received and to dispose of such gold. The Reconstruction Finance Corporation on October 26 issued a circular offering for subscription notes of the Corporation for which such gold would be received at rates to be announced from time to time. By disposing of notes received for their gold, miners were in effect enabled to receive an amount in excess of the statutory rate of $20.67, but this did not affect the market price of gold not eligible for delivery for Reconstruction Finance Corporation notes.

Fed. Supp. 156, that Section 5 of the Order of August 28, which forbade the holding of gold, was not within the mandate of Section 2 of the Act of March 9, 1933, as that Act conferred authority for such an Order upon the Secretary of the Treasury and not upon the President. The relevance of this decision will later be discussed. It is sufficient to state at this point that the section of the Order dealing with the *holding* of gold and not the section dealing with the *acquisition or export* of gold was challenged. The gold market is effectively destroyed even if chance holdings of gold are left untouched."[48]

The Executive Orders of April 5 and August 28, with respect to the acquisition and holding of gold, were issued pursuant to Section 2 of the Emergency Banking Act of March 9, 1933. On December 28, 1933, the Secretary of the Treasury issued an Order (Appendix, p. 79) pursuant to Section 3 of that Act. This Order required "Every person subject to the jurisdiction of the United States forthwith to pay and deliver to the Treasurer of the United States all gold coin, gold bullion, and gold certificates situated in the United States

[48] Even if the decision were extended by analogy to the April Orders, it should be noted that the present enquiry is a factual one, concerning the existence of a gold market, which a decision can affect only prospectively. The uncontested provisions of the Order of August 28 (which alone was in effect on November 16, 1933) were sufficient to destroy a free gold market.

owned by such person." Exceptions analogous to those contained in the April 5 and August 28 Orders were allowed, although the $100 exception was not continued. The Order provided for compensation, following the language of the statute, in "an equivalent amount of any form of coin and currency, coined or issued under the laws of the United States." This Order answered the objections of Judge Woolsey in the *Campbell* case. The penalty for violations of Orders under Section 3 of the Emergency Banking Act was twice the value of the gold. In an Order of January 15, 1934 (Appendix, p. 93), the Secretary of the Treasury expressly reserved the right to deduct from the amount payable for any gold presented after the final date for surrender, January 17, 1934, an amount toward payment of the penalty.[49] Restrictions were therefore placed on an ownership of gold which, even if lawful until December 28, 1933, because of the *Campbell* case, had not carried with it the power to transfer or export. The Order withdrew from ownership holdings of gold in amounts under $100.00 and chance holdings that had not already been withdrawn from circulation.

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[49] By Instructions to the Treasurer on January 17, 1934 (Appendix, p. 96), provision was made for payment, dollar for dollar, in lawful money, for all gold coins and certificates thereafter surrendered which had been withheld in violation of prior Orders, and for payment of $20.67 in lawful money for all gold bullion thereafter surrendered which had been similarly withheld.

On January 30, 1934, the Gold Reserve Act of 1934 (Appendix, p. 98) was approved. It conferred upon the Secretary of the Treasury the power to prescribe "by regulations issued hereunder with the approval of the President * * * the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (1) for industrial, professional, and artistic use; (2) by the Federal Reserve banks for the purpose of settling international balances; and (3) for such other purposes as in his judgment are not inconsistent with the purposes of this Act." It states further that gold may thus be acquired and held, transported, melted or treated, imported, exported, or earmarked only to the extent permitted by the regulations. Gold coin was withdrawn from circulation by the Act, and the United States was prohibited from paying it out under any circumstances. Gold in any form and in every case was therefore subjected to regulation by legislation of a permanent nature.

On January 30 and 31, 1934, the President approved the Provisional Regulations (Appendix, p. 115) issued by the Secretary of the Treasury thereunder. These continued in substance the regulation of the holding, acquisition, and export of gold bullion. Gold coin cannot, under these regulations, be acquired or melted for any purpose except by the United States.

On January 31, 1934, by proclamation (Appendix, p. 144) the President reduced the weight of

the gold dollar to fifteen and five twenty-firsts grains of standard gold.[50] Gold lawfully acquired and held after the Proclamation by the President, in the instances in which it may be sold to the United States, is paid for at the rate of $35 an ounce, less a small deduction for handling charges; similarly, gold which may be acquired from the United States is sold at that rate plus a small amount for handling charges. Gold coin withheld in violation of the Order of the Secretary of the Treasury of December 28, 1933, is paid for, when presented, dollar for dollar, in lawful money; and gold bullion so withheld and presented is still paid for at the rate of $20.67 an ounce, under the provisions of the Order of the Secretary of the Treasury of January 15, 1934, and the Instructions of January 17, 1934 (*supra*, page 112). Therefore no gold coin, whether with its old weight or its new, may circulate. There is no free market for gold coin in terms of lawful money.

3. The Gold Coin Interpretation

A. *The gold clause should be interpreted to call simply for payment in gold coin*

(1) INTENTION OF THE PARTIES AS EXPRESSED

The bonds contain an obligation to pay one thousand dollars in "gold coin of the present

[50] The Proclamation was, in effect, ratified by the Congress by two Acts approved June 19, 1934, c. 655, Sec. 2, 48 Stat. 1115; c. 653, Sec. 1, 48 Stat. 1195, 1107.

standard of weight and fineness." The mortgage contains the phrase "* * * of or equal to the present standard * * *." The "present standard" means that of May 1, 1903. The plain meaning of the clause is that the parties gave the holders of the bonds the right to require payment in gold coin of a particular content. To construe the clause as giving the holders the right to demand payment in currency, equivalent in value to the asserted value of a specified amount of gold at the date of maturity, or, as respondents ask, at the date of payment, would be to rewrite the contract for the parties.

The clause has real meaning when read according to its terms. By providing for payment in gold coin it indicates an intention to protect against depreciation of one kind of money as compared with another, as for example, paper money compared with gold, or silver compared with gold; and by providing that the gold coin so paid shall be of a particular standard, it attempts to assure against payment in coin of lesser gold content. This interpretation is reinforced by the historic origins of the clause in this country.[51] The Civil War period demonstrated the possibility of disparity between two types of money; and the agitation for unlimited coinage of silver near the close of the last cen-

[51] See *e. g.*, A. Nussbaum, *La Clause-Or Dans les Contrats Internationaux*, in 43 *Recueil des Cours, Académie de Droit International* (1933), 559, 562.

tury suggested a similar possibility. In addition, this Government had more than once, and others frequently, reduced the content of circulating coin. The clause thus has real meaning and effect in a dual monetary system where coin and currency are allowed to circulate and fluctuate in value, one against the other, or where gold coins of different metallic content are circulating, and where by law only coin is payable in discharge of certain kinds of debts. The clause does not reveal an intention to protect against a situation where gold coin no longer circulates and all forms of money are maintained in the United States at a parity with each other.[52] It stands in contrast to clauses, more modern than the one in the instant case, which express alternative obligations, designed in the light of the withdrawal of coin from circulation in recent years in a number of countries.[53]

This interpretation is further borne out by the expressed intention of the parties to make the bonds negotiable. The bonds themselves provide that ". . . registration, however, shall not affect the negotiability of the coupons, which shall continue to be transferable by delivery" (R. 158). Section 1

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[52] For a clause of a very different type, adjusting the amount of the debt to the price of gold if the latter should change sufficiently to affect the "general price of merchandise", see *Ames* v. *Quimby*, 96 U. S. 324.

[53] See, *e. g.*, Goodbar, "*Dollar Bond*" *Indentures of French and German Corporations* (1933), 13 Bost. Univ. L. Rev. 22, 48–49.

(2) of Article I of the Uniform Negotiable Instruments Law requires that an instrument to be negotiable must "contain an unconditional promise or order to pay a sum certain in money", and this requirement of the Law would be violated if the obligation were construed as giving an option to pay or to demand an indeterminate amount of money sufficient at a future date to buy a stated amount of gold.[54]

So far as appears, the parties did not anticipate the existense of conditions making it impossible and illegal to procure gold coin with which to meet the obligations. The courts will not revise the contract in order to effectuate what might have been their intention if such a situation had been envisaged. This Court on several occasions has refused to imply an obligation to pay in gold coin, even though such may have been the expectation of the parties, where the contract did not so provide.

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[54] Section 6 (5) of Article I of the Uniform Negotiable Instruments Law provides that the validity and negotiable character of an instrument are not affected by the fact that it designates a particular kind of current money in which payment is to be made. If the gold clause is construed to mean payment in gold coin, as we maintain, the bonds are not rendered nonnegotiable; and the New York courts have so held. *Chrysler* v. *Renois*, [illegible] N. Y. 209.

It is noteworthy that listing has been denied by the New York Stock Exchange to bonds and notes containing in their gold clauses the phrase "or the equivalent thereof." See Post and Willard, *The Power of Congress to Nullify Gold Clauses*, 46 Harv. L. Rev. 1225, note 1.

Legal Tender Cases, 12 Wall. 457, 548; *Thompson* v. *Riggs,* 5 Wall. 663; *Woodruff* v. *Mississippi,* 162 U. S. 291; *Maryland* v. *Baltimore & Ohio R. R. Co.,* 22 Wall. 105. The Court may be particularly reluctant to imply an unexpressed obligation at the behest of the creditors where, as here, the clause in question is part of a standardized form presented to borrowers by lenders. The latter had an opportunity to express their intention clearly; there are gold clauses which state that coin shall be paid or an equivalent in lawful money; but this language was not used, and that which was used is properly construed strictly against the creditors.

(II) BRONSON *v.* RODES AND SUCCEEDING CASES SUPPORT THIS CONSTRUCTION

The decisions of this Court lend support to the view that clauses of the type involved here should be interpreted as giving the right to demand payment in gold coin and not in some currency equivalent. Such was the decision in *Bronson* v. *Rodes,* 7 Wall. 229, and in the cases which followed it. *Bronson* v. *Rodes,* it will be recalled, involved a contract made in 1851, payable "in gold and silver coin, lawful money of the United States." This Court declared that the contract could be satisfied only by payment in coin. The principle of *Bronson* v. *Rodes* was reaffirmed in *Trebilcock* v. *Wilson,* 12 Wall. 687, a few months after the decision in the *Legal Tender Cases.* The *Bronson* and *Trebilcock* cases were followed in *The Emily Souder,* 17 Wall. 666, in which judgment was entered payable in

gold coin for the amount due on drafts stated to be payable in gold.

In two cases involving gold clauses this Court reversed judgments for currency equivalent to the market value of gold, and ordered judgment to be entered for gold coin. *Butler* v. *Horwitz,* 7 Wall. 258; *Dewing* v. *Sears,* 11 Wall. 379. These two cases are especially significant for two reasons. First, they involved obligations payable, respectively, in foreign coin and according to the weight of gold, obligations which might have been construed as contracts for the delivery of a commodity, for the breach of which damages could be awarded in lawful money. Second, the creditors were willing to accept currency in satisfaction. The fact that the Court required payment to be made in coin in such cases indicates a rejection of the view that currency, whatever the amount, might satisfy the contract.

These decisions are not altered by certain other cases in which judgments for the value of gold were approved. In none of these was the action based on a gold-clause obligation. In *The Vaughan and Telegraph,* 14 Wall. 258, and *United States* v. *Erie Railway Co.,* 107 U. S. 1, no gold clause was involved. In *Gregory* v. *Morris,* 96 U. S. 619, the action was not based upon a contract containing a gold clause; in the words of the Court: "the suit is not upon the contract for the recovery of the amount agreed to be paid, but in effect, for dam-

ages on account of the wrongful detention of property mortgaged to secure the debt" (96 U. S. at 624). The case was an action of replevin under the laws of Wyoming Territory, and presented the question of the mode of calculating "damages" in replevin under the Wyoming law. Or, as stated by the Court:

> The question is not whether Gregory had the right to pay in gold dollars after his debt had become due, but whether, having wrongfully got the property into his possession without payment at all, the damages he is required to pay on account of this wrongful act must, as a matter of law, be estimated in gold, or whether they may be in currency (96 U. S. 625).

The case left unquestioned the decisions in *Dewing* v. *Sears* and *Butler* v. *Horwitz, supra,* both actions on contracts, in which judgments for the currency equivalents were reversed and judgments for coin were ordered.

(III) ENGLISH AND PERMANENT COURT CASES DISTINGUISHED

The recent decision of the House of Lords in *Feist* v. *Société Intercommunale Belge d'Electricité* [1934], A. C. 161, is not inconsistent with the view that the gold clause in the present contract must be interpreted as requiring payment in gold coin. The *Feist* case involved the meaning and effect of bonds issued by a Belgian company in 1928 and sold in London, expressed to be payable in the

sum of one hundred pounds "in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928." The House of Lords, reversing the judgment of the Court of Appeal, rested its decision upon a construction of the bonds which none of the judges below had taken,[55] that the bondholders were entitled to currency equivalent to the market value of the specified amount of gold coin.

The conclusion of the House of Lords reaches a different result from that arrived at by this Court in the decisions involving gold clauses, although in each case the clause was enforced. Lord Russell, approaching the question of the meaning of the clause from the standpoint of the time and circumstances of the making of the contract, emphasized two facts concerning the English monetary system of that time which clearly differentiate the background of the *Feist* case from that which prevailed in the United States from the time of the *Bronson* case until very recently. *First,* when the Belgian

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[55] In the Chancery Division, Mr. Justice Farwell held that the gold clause was inconsistent with the controlling provisions of the documents, and that the contract was one to pay £100 and interest at 5½%. He therefore made a declaration authorizing payment in the face amount of the bonds in any form of legal tender. This judgment was affirmed by the Court of Appeal. Lord Justice Lawrence and Lord Justice Romer, in the Court of Appeal, laid emphasis upon the Coinage Act of 1870, which in their opinion made it illegal to stipulate for payment in a particular form of legal tender. The House of Lords, in reversing the judgment below, did not discuss the effect of the Coinage Act of 1870.

bonds were issued in 1928 Great Britain, although having resumed the gold standard three years before, was no longer redeeming currency in gold, and gold coin was substantially no longer in circulation. From this situation Lord Russell inferred that the gold clause was inserted "in contemplation of the contingency of this country going (as it did in 1931) off the gold standard at some future date" and that "neither party to the bond can have contemplated payment under the bond being actually made in gold coins." *Second,* under English law, the Bank of England notes were full legal tender for all purposes at the time the bonds were issued. In both of these respects it will be noted that the situation in England was different from that which until very recently prevailed in the United States. It is evident, therefore, that to approach the question of the meaning of the clause, as the House of Lords did, from the standpoint of the circumstances prevailing at the time the contract was made, will yield a very different result in the case at bar from that reached in the *Feist* case.

The decisions of the Permanent Court of International Justice at The Hague, in the cases of Serbian and Brazilian bonds (P. C. I. J., Series A, Nos. 20–21), are perfectly consonant with the view that the present bonds conferred a right to demand payment in gold coin, and not in an asserted equivalent. The Serbian and Brazilian bonds contained so-called multiple-currency clauses; they were payable in various coun-

tries where the franc was the standard unit, but the franc of no particular country was specified. The bonds called for payment in "gold francs" ("*francs d'or*"), which had no existence as circulating media in any of the countries. That the parties contracted in terms of a measure of value, not a mode of payment, was apparent both from the language employed and from the acknowledged purpose to guard against fluctuations of one national currency in terms of another.

B. Payment in gold coin has been and is impossible and illegal and should be excused

Since it has been impossible to obtain gold coin or gold in the United States to discharge a domestic gold-clause obligation (see pages 101 to 114, *supra*), the present debtor would be excused, in an action on the bonds, from the obligation to pay in gold coin.[56]

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[56] Prior to January 30, 1934, it was legally possible to import gold into this country to discharge a domestic gold clause obligation. But it cannot be contended seriously that each gold clause debtor could have obtained the necessary amount of United States gold outside of the United States. The debtor would be required to seek this coin in competition with other debtors similarly situated, and there was certainly not enough United States gold coin abroad to meet these requirements. Furthermore, even if it be assumed that gold coin were available abroad, the debtor need not seek to obtain it outside the country. This situation was presented in *American Chicle Co.* v. *Somerville Paper Co.*, 50 Ont. L. R. 517, in connection with a mortgage on Cana-

If the respondents could not, outside the bankruptcy proceedings, successfully demand payment in gold coin, their claim in these proceedings cannot be greater.

(1) IMPOSSIBILITY IN FACT

Since a free gold market has, until March 1933, always existed in the United States, even during the period just after the Civil War, when the United States was off the gold standard, legal impossibility has only recently become available as a defense to an obligation to pay in gold coin. The gold clause, properly construed, indicates that the parties contemplated the continuing existence of gold coin as a medium of currency, or at least a free gold market in the United States. Where the terms and circumstances of a contract indicate that the parties rely upon the continuance of conditions, such as a source of supply, which, through unforeseen contingencies, have ceased to exist at the time when performance is due, the obligation to perform will be excused. *The Tornado*, 108 U. S. 342; *Western Hardware and Manufacturing Co.* v. *Bancroft Charnley Steel Co.*, 116 Fed. 176 (C. C. A. 7th); *Browne* v. *U. S.*, 30 Ct. Cl. 124; *International Paper Co.* v. *Rockefeller*, 161 App. Div. 180.

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dian lands which provided for "payment in current gold coin at the option of the mortgagees of $75,000, of lawful money of Canada." The Court rejected the argument that the debtor should have procured coin in the United States, although such coin could have been imported into Canada and was there legal tender at its face value.

The defense of impossibility in fact has another aspect. Since the Government has not only made it impossible to obtain gold but has also required persons to surrender gold to itself, cases of requisition by the Government under its war powers present a close analogy. Where the Government requisitions a supply which was relied upon by the parties to a prior contract, performance of the contract is excused. *Omnia Commercial Co.* v. *U. S.*, 261 U. S. 502; *Moore & Tierney Inc.* v. *Roxford Knitting Co.*, 250 Fed. 278 (N. D. N. Y.). See also *Metropolitan Water Board* v. *Dick Kerr & Co.*, 1918 A. C. 119; *Shipton, Anderson & Co.* v. *Harrison*, 3 K. B. 676 (1915).

(II) IMPOSSIBILITY IN LAW

Not only is payment in gold coin impossible in fact, but an attempt to secure the medium for such payment would involve an illegal act. Such supervening illegality is an independent ground for excusing performance. *Manigault* v. *Springs*, 199 U. S. 473; *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467; *Omnia Commercial Co.* v. *U. S.*, 261 U. S. 502, 511; *Board of Commissioners* v. *Young*, 59 Fed. 96 (C. C. A. 6th); *Northern Pac. Ry. Co.* v. *St. P. & Tacoma Lumber Co.*, 4 Fed. (2d) 359 (C. C. A. 9th); *Operators' Oil Co.* v. *Barbre*, 65 F. (2d) 857 (C. C. A. 10th); *Restatement of the Law of Contracts*, Sec. 458 of Ch. 14; Williston on *Contracts*, Sec. 1938.

The respondents argued below that the defense of impossibility in law as of May 1, 1933, is not available, for the reason that the principle of the decision in *Campbell* v. *Chase National Bank*, 5 Fed. Supp. 156, is applicable to render the Executive Orders of April 5 and April 20 invalid. It will be recalled that this case held that the Executive Order of August 28, 1933, insofar as it requisitioned gold coin, was not within the mandate of the Emergency Banking Act, as the authority to issue such an Order was conferred by that Act upon the Secretary of the Treasury and not upon the President. See page 111, *supra*. The correctness of that decision is not conceded.[57] But if its soundness be assumed, it does not impeach the defense of legal impossibility in the case at bar. The defense of impossibility, in law as of May 1, 1933, raises the question not of the validity of the then existing Orders, but of the right of the obligor to rely upon their assumed validity at that time in the absence of an attack upon them by the bondholders. It can

[57] The decision rests upon an assumed dichotomy between requisition of coin and other measures which the court without defining them intimates would be more properly related to the prevention of hoarding. It should be noted that the Orders of April 5 and August 28 exempted from requisition gold required for legitimate and customary use in industry, profession, or art, for legitimate export purposes, and for other proper transactions (see pages 103, 108, supra). It may be true that not all gold otherwise held by individuals was necessarily held for hoarding purposes; but the difficulty of discriminating between possession for

hardly be suggested that it was incumbent upon the debtor to violate the Orders existing on May 1, 1933, and so to run the risk of criminal prosecution as a condition precedent to asserting the defense of impossibility in law. Compare *The Kronprinzessin Cecilie*, 244 U. S. 12 (1917), in which performance of a contract of carriage was excused where it involved a serious risk, though not certainty, of injury. Compare also *Hulton & Co.* v. *Chadwick & Taylor*, 34 T. L. R. 230, where performance, although it would not have been illegal, was excused because it would probably have resulted in a revocation of the defendant's license to import. Moreover, any possible defect in the mode of issuing the Orders existing on May 1, 1933, has been removed by the Gold Reserve Act of 1934. Section 13 thereof approves, ratifies, and confirms all actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by the President or the Secretary of the Treasury under the Emergency Banking Act. This ratification is equivalent to antecedent authorization; and is controlling at this stage of the proceedings. Compare *Charlotte Harbor Ry. Co.* v. *Welles*, 260 U. S. 8; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *United States* v. *Heinszen*, 206 U. S. 370.

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one purpose and for another would seem to warrant the broader regulation in order to assure the success of the prevention of hoarding. Compare *Powell* v. *Pennsylvania*, 127 U. S. 678; *Westfall* v. *U. S.*, 274 U. S. 256, 259; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.

C. The gold clause obligation may be satisfied by payment of its stated dollar amount, in consequence of impossibility in fact and in law

In the case at bar, only one term of the promise in the gold clause is impossible to perform and illegal. The remainder of the obligation should therefore remain as it stands. In short, the obligation becomes one to pay the stated number of dollars. Compare *Greene* v. *Uniacke*, 46 F. (2d) 916 (C. C. A. 5th). Since the obligation becomes one merely to pay dollars, fluctuations in the value of dollars will be ignored. See *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U. S. 517, 519.[58]

A parallel to the present case arose in Canada during the World War. The court there held that a contract to pay "in current gold coin at the option of the mortgagees of $75,000 of lawful money of Canada" was dischargeable by payment of the face amount of the debt in lawful money where legislation and orders in council made it legally impossible at maturity to procure gold coin

[58] Compare also cases where dollars are paid in the United States to secure delivery of foreign currency abroad. Where the plaintiff elects to sue in quasi-contract rather than for damages, recovery is allowed only for dollars expended, since fluctuations of the currency of the forum are disregarded. *American Union Bank* v. *Swiss Bank Co.*, 40 F. (2d) 446, *Buckman* v. *American Express Co.*, 262 Mass. 299; *Safian* v. *Irving National Bank*, 202 App. Div. 459, aff'd., 236 N. Y. 513. Compare also Nebolsine, *The Gold Clause in Private Contracts*, 43 Yale Law Journal 1051, 1079.

in Canada or to export it to the United States. *American Chicle Co.* v. *Somerville Paper Co.*, 50 Ont. L. R. 517. The court said (pp. 524–5):

> * * * although it may become during a shorter or longer period of time, depending upon the exigencies of the State, impossible for a debtor to comply with a contract to pay his debt in the way in which his creditor desires, then, provided he can do so in another way permitted by the law of his country, his property cannot be held in pledge or forfeited because of that impossibility. And, if the difficulty be caused by an act of State required for the national security, the debtor is relieved, while the law operates, from the abnormal demand, and if sued is enabled to discharge his debt in the currency then made legal tender by his country's laws.[59]

Two recent decisions in this country have reached a similar result. *Irving Trust Co.* v. *Hazlewood*, 148 Misc. 456; *Kennedy* v. *Conrad* (Colo.), unreported, quoted in 78 Cong. Rec. 5953, 5955.

Even if the obligation is regarded as wholly terminated because of the impossibility and illegality

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[59] The decision in the *Feist* case in no way affects the authority of this case on the question of the legal effect of impossibility to procure gold coin within the country, where the obligation is interpreted as a promise to pay in gold coin. The *Feist* case reached a different conclusion on the question of interpretation of the gold clause in bonds which were executed under different circumstances, those circumstances being deemed controlling as to the meaning of the clause.

of performance, the amount of the claim will be determined on quasi-contractual principles. The basis of the quasi-contractual claim is that the claimant is entitled to restitution for what he has given to the debtor. See *N. Y. Life Ins. Co.* v. *Statham,* 93 U. S. 24; *Pullman's Palace Car Co.* v. *Central Transp. Co.,* 171 U. S. 138; *New York Central & Hudson River R. R. Co.* v. *Gray,* 239 U. S. 583; Cf. *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U. S. 467, 486; Woodward on *Quasi Contracts,* Sec. 127. So far as appears, the purchase price of the bonds was in the form of legal tender money, not gold. The court cannot indulge in remote speculation as to the nature of this payment, in the absence of factual foundation of record negativing the presumption that it was in no special form of legal tender money.

But even if gold was given for the bonds, the amount of recovery can be no greater than had currency been given. For recovery is measured by the value of what was given, as of the time it was given. And at that time gold was merely equivalent in value to other lawful money. Moreover, as we shall now show, even if subsequent benefit to the debtor could be considered, there is no evidence that gold ever became of greater value to the debtor than the equivalent face amount of currency.

D. Even if respondents were paid at any time in gold coin its value to them would be only the face amount thereof

On an interpretation of the gold clause to mean payment in gold coin, the respondents are not entitled to claim more than the face amount of the bonds. The unsoundness of a greater claim is best demonstrated by assuming payment in gold coin by the debtor and determining what benefits would accrue to the bondholders from such performance.

The bonds became due on May 1, 1933. It has been shown, *supra,* pages 102 to 106, that on that date the ownership, export, and free circulation of gold in any form was prohibited except in limited irrelevant instances. Therefore, if payment had been made in gold coin on May 1, 1933, the respondents would have been required to surrender it and could under no circumstances have received therefor more than an equal amount of lawful money, i. e., a dollar-for-dollar exchange. Even if it were assumed that because of the decision of Judge Woolsey in *Campbell* v. *Chase National Bank, supra,* page 110, the holding of gold was legal on May 1 and payments in gold coin could have been made without incurring penalty, the consequences, insofar as they are pertinent here, are the same. The validity of the Executive Order of April 20 prohibiting the export of gold coin, gold bullion, and gold certificates has not been questioned. Compare *Ling Su Fan* v. *U. S.,* 218 U. S. 302. If,

therefore, payment in gold coin could legally have been made on May 1, the respondents would have been confined in their use of it to this country. In this country the value of gold bullion did not vary from the statutory price except that on August 29, 1933 the price of newly mined gold and gold to licensees for industrial purposes was increased. The price of newly mined or industrial gold had no bearing on gold coin in the hands of the respondents, who could not circulate it as coin (or as bullion melted down from the coin). Upon surrender they could receive only a dollar-for-dollar exchange. This phase of the Order was not challenged in the *Campbell* case. Indeed, Judge Woolsey vigorously upheld the fundamental aspects of the Order. One holding ordinary gold bullion or gold coin could, therefore, realize on it only at the Federal Reserve banks, and there only at the statutory rate. Therefore, on December 28, 1933, pursuant to the Order of the Secretary of the Treasury, the respondents would have been required to accept for their gold coin legal tender in the face amount of the bonds. See *Kennedy* v. *Conrad,* unreported, quoted in 78 Cong. Rec. 5953, 5955.

When on January 31, 1934, the weight of the gold dollar was reduced by the Presidential Proclamation, no person within the United States was entitled to hold gold coin, gold bullion, or gold certificates except for certain restricted purposes. If payment on the bonds had been made prior to

the Proclamation, the respondents would on the date of the Proclamation be holding, not gold, but other money in an amount equal to the face amount of the bonds. If payment were made after the Proclamation, such a transfer would involve an acquisition of gold by the respondents in violation of the Gold Reserve Act and the regulations pursuant thereto. It is, therefore, unnecessary to determine whether after January 31, 1934, licensed holders of gold might command a price according to the new statutory price of gold or whether one surrendering gold without being subject to the penalty provisions of the Order of the Secretary of the Treasury of December 28, 1933, could receive therefor the full statutory price. It is sufficient that after January 31, 1934, *the respondents* could not be in possession of gold coin received prior thereto and could not avail themselves in any respect of the new statutory price if gold coin were offered to them and accepted.

The respondents are, therefore, seeking to claim on a money obligation a principal amount in excess of what they would receive if the debtor performed his obligation. They are seeking a windfall—not indemnity for loss. On the other hand, a claim by the respondents for an amount of money equal to the stated dollar amount of the bonds would be a claim for the most they could have realized if payment had actually been made in gold coin on May 1, 1933, or after January 31, 1934. Compare

Wicker v. *Hoppock,* 6 Wall. 94; *U. S.* v. *Behan,* 110 U. S. 338.

4. The currency equivalent interpretation

A. *The currency equivalent is the stated dollar amount of the obligation*

In the event that the Court should reject the interpretation advanced above, that the gold clause is a single obligation for payment in gold coin, and is of the opinion that the clause calls, in the alternative, for an "equivalent" in other money, it is necessary to select a standard for determining such equivalence. The respondents, in their petition for intervention (filed December 27, 1933), claimed as an alternative to payment in gold coin, payment in lawful money at the "market value" of the gold contained in such gold coin (R. 58, 59); but since the statutory price of gold has been changed by the Proclamation of January 31, 1934, from $20.67 to $35 an ounce, the respondents appear to believe that "equivalent" means the statutory equivalent (R. 135, 136; 252, 253).

If the gold clause is to be construed as a measure of payment, it would seem apparent that the equivalent is not an amount in excess of the value of the gold coin paid to creditors as expressly stipulated in the clause. "Equivalent" denotes an amount of money which would be worth to the creditor the same as the stipulated coin; that is, an amount which would leave him as well off as he would have

been had he received the coin. This view is borne out by the origins of the clause and by the decisions. Where there is a continuous free gold market and a dual monetary system is permitted, the equivalent is deemed to be the amount of legal tender currency which would purchase the stipulated gold coin in that market. See *The Vaughan and Telegraph,* 14 Wall. 258; *Gregory* v. *Morris,* 96 U. S. 619. Where there is not a free gold market, and by reason of the restrictions upon the holding of and dealing in gold coin such coin has a value to creditors no greater than other money of equal face amount, there is equivalent payment when there is payment of any money legal tender for the same amount as the gold coin.

It would be a strange interpretation of "equivalence" which would assure to creditors an amount in excess of that which they could have realized if coin were paid at the time, in the amount, and of the standard of weight and fineness of the letter of the contract. The respondents would read into the gold clause and into the word "equivalent", which they imply, an immunity from the Congressional power to regulate the holding and dealing in gold as well as from the power to regulate, and to render effective the regulation of, the value of the dollar.

Even if the debtor, on the due date of the bond, had paid its debt in gold coin and had thereby specifically performed its contract, it is evident that

there has not been a moment since that date, at which the respondents could have derived any greater benefit from the gold coin thus paid than from an equivalent amount, dollar for dollar, of any other kind of money in circulation. What could they have paid with it—no more debts, no more taxes. What could they have secured—no more food, no more raiment, no more property, real or personal.

The respondents are not seeking "equivalence." They are seeking an opportunity to enrich themselves upon a theory which allocates to them greater returns from a breach of the expressed obligation than from its performance.

B. Even if currency equivalence is defined in terms of statutory price of gold the obligation may be satisfied at its dollar face amount in legal tender, since conversion is appropriate as of May 1, 1933

We have attempted to show that the limited statutory price for gold prevailing since January 31, 1934, is not a proper measure of equivalence in the event that the gold clause is deemed to confer a right to demand currency equivalent in value to the gold coin stipulated. But even if the limited statutory price is a proper measure of equivalence, it is irrelevant in the case at bar. If equivalence in currency is to be computed, the computation should be made as of the maturity date of the bonds, namely, May 1, 1933. At that time, as we have shown, gold coin or bullion had no greater value in

this country than paper currency; the value in the foreign markets could not have been availed of; and the statutory price of gold had to no extent been changed.

This Court has not hitherto been required to determine the date as of which recovery on a gold-clause obligation should be computed if judgment is to be rendered in currency measured by the value of gold. In analogous situations, however, the date of maturity has been adopted as the appropriate one for making the conversion. Such has been the rule declared by this Court in cases involving breach of contract to deliver commodities; and in cases involving obligations to pay foreign money in this country. *Hicks* v. *Guinness*, 269 U. S. 71.[60] A similar rule prevails generally in cases of contracts payable in a specified currency. In *Effinger* v. *Kenney*, 115 U. S. 566, 575, this Court said:

> Where a contract is for the delivery of specific articles, the rule undoubtedly is that the damages recoverable for its breach are to be determined by the value of the articles at the time and place of their delivery. Where a contract is payable in a specified currency, the rule is also clear that such cur-

[60] Compare *Deutsche Bank Filiale Nurnberg* v. *Humphrey*, 272 U. S. 517, where the obligation was to pay foreign money abroad. In such a case no right or duty exists under our law at the due date, and our courts will convert into dollars at the date of judgment. See *Zimmermann* v. *Sutherland*, 274 U. S. 253, 255–6; and the discussion in 40 Harvard Law Review 619.

> rency is demandable and receivable at the maturity of the contract, whatever change in its value by increase or depreciation may have taken place in the meantime. The damages recoverable for a breach of the contract are to be measured by the value of the currency at its maturity. * * *

The date of maturity was likewise adopted by the House of Lords in the *Feist* case.

III

Power over coinage and currency is an attribute of sovereignty

If we rested this case here, it might well be said that we had done so on principles too narrow and restricted, no matter how compelling and conclusive they may be. Broader ground, comprehending all that has been said and more, should also be taken. If this nation is to be regarded as more than a congeries of people, if it is to continue as a welded whole, its authority to coin money and regulate the values thereof, to legislate concerning the currency and to prescribe what shall be legal tender for all purposes cannot be restrained by the provisions of private contracts nor subordinated to the tenor of individual obligations.

That the United States is a sovereign nation and possesses the essential powers of sovereignty has been upheld by this Court in early and late decisions. In *Cohens* v. *Virginia,* 6 Wheat. 264, 380, Chief Justice Marshall declared:

> The American states, as well as the American people, have believed a close and firm union to be essential to their liberty and to their happiness. They have been taught by experience that this union cannot exist, without a government for the whole; and they have been taught by the same experience, that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. * * *

In his concurring opinion in *The Legal Tender Cases*, Mr. Justice Bradley said, p. 554:

> The Constitution of the United States established a government, and not a league, compact, or partnership. It was constituted by the people. It is called a government. In the eighth section of Article I it is declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in *the government of the United States*, or in any department or office thereof. As a government it was invested with all the attributes of sovereignty. * * *

In another Legal Tender Case, *Juilliard* v. *Greenman*, 110 U. S. at p. 438, Mr. Justice Gray asserted that, "The people of the United States by the Constitution established a national government *with sovereign powers, legislative,* executive, and judi-

cial" (italics ours). Again, in *Mackenzie* v. *Hare,* 239 U. S. 299, 311, Mr. Justice McKenna said that "there may be powers implied, necessary, or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty." And recently, in *Burnet* v. *Brooks,* 288 U. S. 378, 396, Chief Justice Hughes declared:

> As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations. * * * "We should hesitate long", we said in *Mackenzie* v. *Hare,* 239 U. S. 299, 311, "before limiting or embarrassing such powers."

Similar assertions of the existence of sovereign power are to be found in *Tiaco* v. *Forbes,* 228 U. S. 549, 556–557, in which Mr. Justice Holmes said: "It is admitted that sovereign states have inherent power to deport aliens, and seemingly that Congress is not deprived of this power by the Constitution of the United States"; and in *Georgia* v. *Chattanooga,* 264 U. S. 472, 480, in which Mr. Justice Butler pronounced (p. 480): "The power of eminent domain is an attribute of sovereignty, and inheres in every independent State", citing *United States* v. *Jones,* 109 U. S. 513, *Boom Co.* v. *Patterson,* 98 U. S. 403, and other cases to the same effect.

The greatest of these sovereign powers, no doubt, is that of self-preservation, or national defense, but

next to it and closely associated with it, in war and in peace, is the power to coin or create money, control the currency, and to regulate its value. Said Mr. Justice Bradley in the *Legal Tender Cases* (pp. 563, 567):

> It is absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the *sword* and the *purse* and the right to wield them without restriction on occasions of national peril. * * * * * * * * *
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> I do not say that it is a war power, or that it is only to be called into exercise in time of war, for other public exigencies may arise in the history of a nation which may make it expedient and imperative to exercise it. But of the occasions, when and of the times how long, it shall be exercised and enforced, it is for the legislative department of the government to judge. Feeling sensibly the judgments and wishes of the people, that department cannot long (if it is proper to suppose that within its sphere it ever can) misunderstand the business interest and just rights of the community.

Even if the framers of the Constitution had omitted the words "The Congress shall have power * * * to declare war", it can scarcely be doubted that such power would be upheld as an attribute of sovereignty, and that under it the manhood and the means of the country could be forced into service. The truth of this is emphasized

by what we know of modern warfare, which fights its battles not alone with armies in the field, but impresses whole peoples and commands their resources to the utmost. Interwoven with this great power and almost as essential is complete control of coinage and currency, as to which it is equally true that the problems of peace are no less difficult than those of war. In his writings (Ed. 1854, Vol. 7, p. 463), Mr. Jefferson said: "Coinage is peculiarly an attribute of sovereignty"; and this Court, in *Ling Su Fan* v. *United States,* 218 U. S. 302, 310, asserted that "The power to 'coin Money and regulate the value thereof, and of foreign coin', is a prerogative of sovereignty and a power exclusively vested in the Congress of the United States."

Story, in his Constitution of the United States (5th Ed., Vol. 2, p. 59), pointed out:

> In England, this prerogative belongs to the Crown, and in former ages it was greatly abused. * * * The only question which could properly arise under our political institutions is, whether it should be confided to the National or to the State government. It is manifest that the former could alone give it complete effect, and secure a wholesome and uniform currency throughout the Union.

Concerning the control of the currency, as a prerogative of sovereignty, it was said in the famous

Mixed Money Case, decided in the year 1604 (Sir John Davies' Report, pp. 48, 51, 55), that:

> It appertaineth only to the king of *England,* to make or coin money within his dominions; so that no other person can do it without special license or commandment of the king; and if any person presume to do it of his own head, it is treason against the person of the king by the common law; * * *. * * * that as the king by his prerogative may make money of what matter and form he pleaseth, and establish the standard of it, so he may change his money in substance and impression, and enhance or debase the value of it, or entirely decry and annul it, so that it shall be but bullion at his pleasure. * * *

and showing the close analogy of that ancient case to the one at bar (pp. 72–73):

> it was resolved, that although at the time of contract and obligation made in the present case, pure money of gold and silver was current within this kingdom, where the place of payment was assigned; yet the mixed money being established in this kingdom before the day of payment, may well be tendered in discharge of the said obligation, and the obligee is bound to accept it; * * *[61]

[61] Blackstone (ch. 6, p. 88; Lewis 1900 Vol. 4, 1492) tells us that by amendments to the statute 25 Edw. III, "the crime itself (counterfeiting or importing and circulating counterfeit money) is made a species of high treason; as being a breach of allegiance, by infringing the King's prerogative, and assuming one of the attributes of the

Historical accounts of the confusion which existed among the several original States, resulting in the transfer of this prerogative from them to the United States, will be found in Story's Constitution of the United States (5th Ed., Vol. 2, pp. 58,

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sovereign, to whom alone it belongs to set the value and denomination of coin made at home or to fix the currency of foreign money * * * and, upon the same reasons, by a law of the Emperor Constantine false coiners were declared guilty of high treason, and were condemned to be burned alive: as by the laws of Athens all counterfeiters, debasers, and diminishers of the current coin were subjected to capital punishment."

There is also contained under crimen falsi the crime of high treason, which is multiple: as if anyone should falsify the seal of our Lord the King, or make false money, and that sort of thing. (*Bracton, DeLegibus et Consuetudinibus Angliae* II, 3, fo. 118 b.)

Those who are guilty of counterfeiting have committed high treason. (*The Code of Justinian*, IX, 24, 2.)

When coinage was established as a state monopoly, the exercise of the function became an attribute of sovereignty.

In Persia, Macedon, and Rome, to coin gold, except in special circumstances, was to claim imperial power. (*Money and Monetary Policy in Early Times*, A. R. Burns (1927), pp. 83, 109.)

The right to coin money has always been and still remains the surest mark and announcement of sovereignty. (*History of Monetary Systems* (Alexander Del Mar), p. 107.)

The right of minting coins was, from the earliest days, so closely connected in the public mind with the power of the state, that it was always regarded as an essential attribute of sovereignty, and the history of the exercise of this power reflects the general lines of development of state authority itself. (*Money* (Karl Helfferich, 1927), p. 29.)

Similarly see *Moneys of Antiquity*, II (Lenormant), p. 427.

59); A History of the People of the United States (McMaster, Vol. 1, pp. 189–193); A History of Currency in the United States (A. Barton Hepburn, pp. 33, 34); Formation of the Union (Albert Bushnell Hart, pp. 121, 122); Financial History of the United States (Davis Rich Dewey, pp. 101, 102); The Critical Period of American History, 1783–1789 (John Fiske, p. 165). See also *Shollenberger* v. *Brinton,* 52 Pa. State, 9, 67, 69.

Section 10, Article I, of the Constitution provides that "No State shall * * * coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts", thus clearly recognizing that these powers which had been possessed by the States were sovereign and that their retention would be not only inconsistent with but in derogation of the sovereignty attaching to the National Government by virtue of its creation or vested in it by the Constitution. In emptying the States of this great power, manifestly it was not intended to annihilate it, since the necessity for its continued exercise was, or probably would be, greater than ever before. On the contrary, the words of limitation thus applied to the States made certain of the centralization of this high prerogative in the Government of the United States. Thayer (Legal Essays 1908, p. 75) expressed the idea in these words:

> The Constitution, in giving to Congress the power to coin money is not, just then,

> concerned with the technicalities of law or political economy; it is disposing of one of the "*jura majestatis*" [62] in brief and general terms in phrases which are the language of statesmen.

In *Julliard* v. *Greenman, supra,* pp. 439, 446, this Court indicated the scope of this sweeping power in these words:

> The breadth and comprehensiveness of the words of the Constitution are nowhere more strikingly exhibited than in regard to the powers over the subjects of revenue, finance, and currency, of which there is no other express grant than may be found in these few brief clauses. * * *
>
> By the Constitution of the United States, the several States are prohibited from coin-

---

[62] The legitimation of money and the giving it its denominated value is justly reckoned *inter jura majestatis*, and in England it is one special part of the king's prerogative (Pleas of the Crown (Hale, I), p. 188).

In the George Washington Law Review (March 1934), p. 321, Professor Charles S. Collier, in an able and comprehensive review of the subject, "Gold Contracts and Legislative Power", observes: "The fundamental intention of the framers of our present Constitution was to transfer this whole subject of the currency to the control of Congress and to make that control doubly sure by restricting the states specifically and omitting any specific relevant restrictions as regards the newly established federal powers in this field.

Since the general intention was to confer upon Congress control over the currency, and no specific restriction was mentioned as applicable to Congress, it may well be urged that the Nation should be regarded as succeeding to the powers which may be deemed *appropriate to sovereignty* in relation to the whole question of currency control."

ing money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. But no intention can be inferred from this to deny to Congress either of these powers. Most of the powers granted to Congress are described in the 8th section of the first article; the limitations intended to be set to its powers, so as to exclude certain things which might otherwise be taken to be included in the general grant, are defined in the 9th section; the 10th section is addressed to the States only. * * *

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. The power, as incident to the power of borrowing money and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. * * * The power of issuing bills of credit and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several Colonies and States; and during the

> Revolutionary War the States, upon the recommendation of the Congress of the Confederation had made the bills issued by Congress a legal tender. * * * The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States.

But if doubt remains that complete power over coinage and currency, in the sense here maintained, is an attribute of sovereignty, as much so in this republic as in France or Great Britain, and as necessary on occasion to it as to them, if respondents insist that the spirit of the Constitution was violated by the Joint Resolution, or if there be any left who claim that the clause which conferred upon the Congress "power to coin money, regulate the value thereof, and of foreign coin", contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money or to have the uses of money, the answer is made in the words of this Court that:

> If by this is meant that because certain powers over the currency are expressly given to Congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contrary it has been ruled that power over a particular subject may be exercised as auxiliary to an express power,

> though there is another express power relating to the same subject, less comprehensive. * * * Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated. * * * [*Legal Tender Cases, supra,* pp. 544, 545.]

In *Martin* v. *Hunter,* 1 Wheat. 326, it was said:

> The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. * * *

and by Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 407:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. * * *

If, as was said by Mr. Justice Story in *Martin* v. *Hunter, supra,* "The instrument was not intended to provide merely for the exigencies of a few years,

but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence", it is certain that its framers claimed no such omniscience or prevision as enabled them to foresee the complex problems of the Twentieth Century and to prescribe the formulae for their solution. But broad outlines and great principles they did lay down, from which this Court has recognized and developed the doctrine of sovereign powers or, as it is sometimes phrased, of auxiliary or resulting powers, until the authority "to Establish Post Offices and post Roads" has literally come to mean that a swift carrier may take the wings of the morning and fly from coast to coast so that a fast ship may deliver the mail a few days earlier to our Pacific possessions or to the uttermost parts of the earth.

> No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy.

The same may be asserted also of all the nonenumerated powers included in the authority expressly given "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." It is impossible to know what thoese nonenumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. It certainly was intended to confer upon the government the power of self-preservation. * * *

* * * * *

And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any num-

> ber of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. * * *
>
> And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. * * * [*Legal Tender Cases,* 12 Wall. 532–535.]

In *Juilliard* v. *Greenman,* at pp. 449–450, the Court said:

> Congress, as the legislature of a sovereign nation, being expressly empowered by the Constitution "to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national-bank bills; and the power to make the notes of the government a legal tender in payment of

> private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and therefore, within the meaning of that instrument, "necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States."

We have not lost sight of the contention of respondents that the Congress acted improvidently, that property rights cannot be maintained or prosperity restored upon a policy of repudiation and that the measure adopted is economically unsound, a view vigorously presented in the Congress and in the press when the Joint Resolution was under consideration. Conversely, others, of at least equal probity and wisdom, maintained that the guarantees of liberty and of property, as well as the essentials of justice, do not inexorably require, at all costs and under all circumstances, the strict enforcement of private obligations affected with a public interest; and that this Resolution was

one of the greatest of the instrumentalities placed by the Congress in the hands of the President to enable him to deal with pressing national needs, the existence of which no one denied. The better answer, however, is that this Court will not narrow the discretion of the Congress to one view or the other, so long as the means employed is not clearly arbitrary or capricious, but as it said in *Juilliard* v. *Greenman, supra,* p. 450:

> Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts. * * *

CONCLUSION

We respectfully submit, therefore, that the decree entered by the court below is right and that it ought to be affirmed.

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DECEMBER 1934.

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In the Supreme Court of the United States

OCTOBER TERM, 1934

NOS. 471 AND 472

UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION, et al., petitioners

v.

BANKERS TRUST COMPANY AND WILLIAM H. BIXBY, trustees

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 531

F. EUGENE NORTZ, PETITIONER

v.

UNITED STATES

NO. 532

JOHN M. PERRY, PETITIONER

v.

UNITED STATES

ON CERTIFICATES FROM THE COURT OF CLAIMS

APPENDIX TO BRIEFS FOR THE GOVERNMENT IN THE ABOVE CASES

PROCLAMATION OF THE PRESIDENT, MARCH 6, 1933[1]
(48 STAT., "PROCLAMATIONS OF THE PRESIDENT OF THE UNITED STATES", P. 1)

[BANK HOLIDAY, MARCH 6-9, 1933, INCLUSIVE]

WHEREAS there have been heavy and unwarranted withdrawals of gold and currency from our banking institutions for the purpose of hoarding; and

WHEREAS continuous and increasingly extensive speculative activity abroad in foreign exchange has resulted in severe drains on the Nation's stocks of gold; and

WHEREAS these conditions have created a national emergency; and

WHEREAS it is in the best interests of all bank depositors that a period of respite be provided with a view to preventing further hoarding of coin, bullion or currency or speculation in foreign exchange and permitting the application of appropriate measures to protect the interests of our people; and

WHEREAS it is provided in Section 5 (*b*) of the Act of October 6, 1917 (40 Stat. L. 411), as amended, "That the President may investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange and the export, hoarding, melting, or earmarkings of gold or silver coin or bullion or currency * * *"; and

---

[1] Certified copies of the Proclamations, Orders, Regulations, and Instructions contained herein have been filed with the Clerk of the Court.

WHEREAS it is provided in Section 16 of the said Act "that whoever shall willfully violate any of the provisions of this Act or of any license, rule, or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of this Act, shall, upon conviction, be fined not more than $10,000, or, if a natural person, imprisoned for not more than ten years, or both; * * *";

NOW, THEREFORE, I, Franklin D. Roosevelt, President of the United States of America, in view of such national emergency and by virtue of the authority vested in me by said Act and in order to prevent the export, hoarding, or earmarking of gold or silver coin or bullion or currency, do hereby proclaim, order, direct and declare that from Monday, the sixth day of March, to Thursday, the ninth day of March, Nineteen Hundred and Thirty Three, both dates inclusive, there shall be maintained and observed by all banking institutions and all branches thereof located in the United States of America, including the territories and insular possessions, a bank holiday, and that during said period all banking transactions shall be suspended. During such holiday, excepting as hereinafter provided, no such banking institution or branch shall pay out, export, earmark, or permit the withdrawal or transfer in any manner or by any device whatsoever, of any gold or silver coin or bullion or currency or take any other action which might facilitate the hoarding thereof; nor shall any such banking institution or branch pay out deposits, make loans or discounts, deal in foreign exchange, transfer credits from the United States to any place